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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the State of New York Court of Appeals

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Respondents.

Petition for a Writ of Certiorari to the State of New York Court of Appeals

The petitioner Gannett Co., Inc. ("Gannett") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals entered in this proceeding on December 19, 1977. Respondents are Hon. Daniel A. DePasquale, County Court Judge of Seneca County, New York; Kyle E. Greathouse; David R. Jones; and Stuart O. Miller, District Attorney of Seneca County, New York. Mr. Miller, at the time of the events pertinent to this proceeding, was the Public Defender representing David R. Jones but was thereafter elected District Attorney. He is substituted as a party pursuant to Rule 48(3) of the Court.

Opinions Below

The opinions of the New York Court of Appeals dated December 19, 1977 are set forth in the Appendix at 2a[1] and are reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756. The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department dated December 17, 1976 is set forth at 21a and is reported at 55 AD2d 107, 389 N.Y.S.2d 719. The orders of the trial court dated November 4, 1976 and November 17, 1976, excluding the public and press from a pre-trial suppression hearing and denying access to the transcript thereof, are set forth at 29a and 33a and are unreported.

Jurisdiction

The judgment of the State of New York Court of Appeals was entered on December 19, 1977. A timely motion for reargument was denied on January 12, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May the press and public, consistently with the First, Sixth and Fourteenth Amendments to the United States Constitution, be ejected from a traditionally public pretrial suppression hearing when a trial judge believes that publication by the press of truthful statements concerning the hearing might threaten the right of a defendant to an impartial jury?

[1]References to "__a" are to the pagination of the Appendix to this Petition; references "__r" are to the pagination of the Record in the New York Court of Appeals.

2. Does an order excluding the press and public from a pretrial suppression hearing, issued without notice, hearing or findings of fact, deprive the press and public of their First and Sixth Amendment rights without due process of law?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

The Factual Background

In mid-July, 1976, Wayne Clapp, formerly a policeman in a suburb of Rochester, New York, disappeared. On July 21, 1976, Kyle E. Greathouse and David R. Jones were arrested in Michigan and charged with Clapp's murder (26-27r). Following their extradition to New York, Greathouse and Jones were indicted for Second Degree Murder in Seneca County, New York, approximately forty miles from Rochester and the site of the homicide.

Gannett is the owner of two daily Rochester newspapers, whose circulation extends to Seneca County. Gannett reporters were assigned to observe and to report upon both the murder investigation and the post-arrest criminal proceedings, which the District Attorney and defense attorneys had described as "novel" and "complex" (26-28, 61r) because the corpse of the victim had never been found.

On November 4, 1976, an evidentiary suppression hearing was scheduled to take place before Seneca County Court Judge DePasquale. At the commencement of the hearing, the defendants moved to exclude both the press and the public from the courtroom, asserting only that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial . . ." (30a). The prosecutor acquiesced in the request, and the court, with no further inquiry, granted it, stating:

> ". . . these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions" (31a).[2]

No evidence and no other explanations were offered in support of the closure. The courtroom was cleared, and the hearing commenced.

During the hearing a Gannett reporter, who had been ejected, submitted a written request to the Court seeking a postponement of the proceeding to enable attorneys to argue against the closure (73r). The request was denied and the hearing concluded on that Friday afternoon.

[2]The entire colloquy among the parties at the time of the exclusion is set forth at 30-31a.

How Federal Questions Were Presented

On Monday morning, November 8, 1976, Gannett attorneys moved, by order to show cause, to vacate *nunc pro tunc* the closure order and to gain access to the stenographic transcript of the hearing, on the grounds that the court's order (1) had abridged First and Sixth Amendment rights of the press and public to attend and to disseminate news of the hearing, and (2) had been issued in a procedurally improper manner (42a). The trial court refused to permit argument on the merits of the Gannett motion until November 16, 1976 when it adhered to its earlier order, declaring there were no "authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press" (37a). In addition, the court denied access to the hearing transcript in perpetuity (34a at ¶3).

The Proceedings in the Courts Below

The following day, an original proceeding in the nature of prohibition and mandamus, challenging the closure orders on First, Sixth and Fourteenth Amendment grounds, was commenced by Gannett in the Supreme Court of the State of New York, Appellate Division, Fourth Department. On December 17, 1976 that Court unanimously held that the exclusionary orders transgressed the public's "vital interest in open judicial proceedings, especially criminal proceedings" (23a) and further constituted an unjustified prior restraint on publication which violated the First Amendment. It accordingly vacated the trial court's orders.

Prior to the decision of the Appellate Division, both defendants had pleaded guilty to lesser crimes in satisfaction of the indictments pending against them (5a).

On appeal, the New York Court of Appeals dismissed the case as technically moot. However, describing the critical importance of the matter to both the courts and the news media, it retained jurisdiction and, in a 4-2 opinion, upheld the ejection of the public and press from the courtroom.

Relying upon the judiciary's "inherent power to limit public access" (7a), and noting the reservation of the question by this Court in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 564 n. 8 (1976) (10a), the majority declared:

> ". . . Knowing . . . that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt . . . we require the Trial Judge to ensure that tainted evidence never see the light of day . . ." (8a).

"To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced . . . . At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.

. . .

". . . To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.

. . .

". . . Th[e] level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity . . ." (10-11a).

Two judges dissented, concluding that placing the burden of proof upon the press to justify openness of a proceeding would lead to closure in virtually every newsworthy case. Rather, the dissenters would sanction closure only in cases of compelling necessity where other means of preserving a fair trial had been proven ineffective:

> ". . . Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods-venire, continuance, instructions, admonitions to witnesses, and parties and counsel, sequestration of the jury, or change of venue—would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment" (19a) (citations omitted).

Reasons for Granting the Writ

I. Introduction

In *Nebraska Press Assn. v. Stuart,* 427 U.S. 539 (1976), this Court set forth severe strictures against the issuance by trial judges of orders restraining the press from publishing information in its possession.[3] In response to *Ne-*

[3]Doubt has been expressed that such orders can ever be sustained in the criminal trial context. *Id.* at 570 (White, J., concurring); *cf., id.* at 572-73 (Brennan, J., concurring); *id.* at 617 (Stevens, J., concurring).

braska Press, a number of courts have resorted to a different and even more drastic device to limit pre-trial publicity: they have ordered the press, and the general public as well, ejected from courtrooms entirely. In this representative case, a majority of the New York Court of Appeals, specifically relying upon the reservation of the exclusion issue in *Nebraska Press,*[4] has sanctioned holding secret pre-trial proceedings simply at the request of criminal defendants. The decision effectively permits the destruction, based upon plain speculation, of values secured to the press and public both by the First Amendment and the Public Trial clause of the Sixth Amendment.

The confusion evidenced by conflicting lower court decisions concerning the question presented by this case, the fundamental societal interests at stake, the increasing frequency with which exclusionary orders are issued, as well as the plain error in the opinion below, fully warrant review and clarification by this Court.

2. The Interests of the Press and Public

The presence of the press and public at trials serves a vital purpose protected by the First Amendment:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal

[4] *Id.* at 564 n. 8; *id.* at 576 n. 3, 584 n. 11 (Brennan, J., concurring).

> justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 587 (Brennan, J., concurring).

The right of the press and public to attend criminal proceedings is also guaranteed by the Public Trial clause of the Sixth Amendment, and is derived from an abiding distrust of secret tribunals. Public accessibility directly affects the trial process itself, as "an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948). Beyond the general public, the press has always been regarded as the "handmaiden of effective judicial administration" since it "guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966). The significance of the effect of public attendance upon the trial process[5] has led the Court to declare that a trial is a "public event. What transpires in the courtroom is public property . . . ." *Craig v. Harney,* 331 U.S. 367, 374 (1947).

While under certain circumstances the normally coinciding interests of the accused and the public in a public trial may appear to diverge, the seeming conflict does not inherently require that the public interest yield and the courtroom be closed. Closure may mask a collusion among the participants harmful to the defendant, and of which he is personally unaware. Alternatively, a closed

[5] Specific benefits attributed to the public nature of trials include the enhancement of truthful testimony, the recruitment of unknown witnesses, and greater conscientiousness of participants. *United States v. American Radiator & Standard San. Corp.,* 274 F. Supp. 790, 794 (W.D. Pa.), *aff'd* 388 F.2d 201 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).

proceeding may unduly benefit a criminal defendant to the detriment of the public interest. Thus, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial." *Singer v. United States,* 380 U.S. 24, 35 (1965). The principle is clear that "justice cannot survive behind walls of silence . . ." *Sheppard v. Maxwell, supra,* 384 U.S. at 349.

The dual function of the press in the criminal justice system—"to report fully and accurately the proceedings of government" and "to guarantee the fairness of trials" (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 [1975]) is in many ways more critical during the pre-trial hearing stage of the criminal process than at the trial on the merits. The overwhelming majority of criminal prosecutions consist solely of "pre-trial" proceedings followed by dismissals or, as here, pleas of guilty.[6] Moreover, the issues pertinent to suppression hearings specifically concern the propriety of the conduct of law enforcement officials,[7] concerning which there is a "paramount public interest in a free flow of information to the people. . . ." *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964).

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[6]For example, in New York City during 1976, 89.7% (17,770) of all dispositions of felony indictments were made prior to trial. In the remainder of New York State, 93.4% (16.676) of such dispositions in 1976 were made prior to trial, and during that some period in Seneca County, *100%* of all felony dispositions (37 indictments) took place without trial. State of New York, *Twenty-Second Annual Report of the Judicial Conference (1977),* 52-55.

[7]A criminal defendant in New York is entitled to a suppression hearing only when he submits affidavits setting forth facts which demonstrate an unlawful search and seizure, unlawful eavesdropping, involuntarily obtained confession, or tainted identification proceeding. N.Y. Crim. Pro. Law §§ 710.20, 710.60.

An order excluding the public and press from a suppression hearing at the request of a criminal defendant thus has profound constitutional significance, since it at once deprives the public and press of their right to a public trial, infringes upon the right to gather news,[8] and restrains the press from observing and commenting upon public institutions. Finally, it interferes with the right of the public to receive information critical to self-governance. *Cf., Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 757 (1976).

3. The Opinion of the Court Below is Erroneous

The preservation of a defendant's right to an impartial jury is essential, yet the task of the judiciary must be to seek an accommodation when it is suggested that that right is threatened by press commentary, for:

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

Here, of course, there were available to the trial court a number of measures, short of exclusion, which do not

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[8]*See e.g., Branzburg v. Hayes,* 408 U.S. 665, 681, 707 (1972); *id.* at 727-28 (Stewart, J., dissenting). The issue in this case involves the right of *both* the press *and* public to attend pre-trial evidentiary hearings which are traditionally open to the public in New York State. Hence, there is neither an assertion of an "unrestrained" right to gather information (*cf. Zemel v. Rusk,* 381 U.S. 1, 17 [1951]), nor is there an assertion of a right of access on behalf of the press which exceeds that of the public. *Cf., Pell v. Procunier,* 417 U.S. 817 (1974). Moreover, unlike the prison regulations upheld in *Pell,* the exclusionary orders here were specifically aimed at restricting the reporting of a pre-trial hearing, and effectively foreclosed any observation of that event. *Cf. id.* at 830.

infringe upon the rights of the press and public yet which have repeatedly been recognized by this Court, either alone or in combination, as effective means of eliminating the detrimental impact of pre-trial publicity. *See, e. g., Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563-65; *Sheppard v. Maxwell, supra,* 384 U.S. at 357-62. Accordingly, this Court has not sanctioned closure of pre-trial proceedings, for it has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media . . ." (*id.* at 350).

The Court of Appeals, however, did not agree. Disregarding the precept that the:

> "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government" (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 492),

it characterized the public interest as "mere curiosity" which had not reached the "level of legitimate public concern." (11a). Further, it repudiated the publicity-mitigating measures which have been endorsed by this Court, on the conclusory basis that "[c]ontinuance, extensive *voir dire* examinations, limiting instructions or venue changes *may* prove paltry protection"[9] (emphasis supplied) (10a) for the rights of a defendant. Thus, by simply brushing aside the importance of open judicial

[9]The Court of Appeals eliminated change of venue as a remedy even though the population of Seneca County was 35,083; that of counties contiguous to Seneca County was 349,324; and that of the Judicial Department in which Seneca County is located was 3,915,433 (*1975 New York Legislative Manual,* 1292-93)—certainly a "substantial pool of prospective jurors" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563 n. 7) from which an impartial panel could undoubtedly have been selected.

proceedings, the Court of Appeals unnecessarily permitted closure as a remedy of the first instance—to the immediate and certain detriment of the rights of the press and public.

The majority opinion erred further by effectively authorizing closure of pre-trial hearings simply on request in every newsworthy case. As this Court has observed, "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 554) and "undifferentiated fear or apprehension" is not sufficient to overcome First Amendment rights (*Tinker v. Des Moines School Dist.,* 393 U.S. 503, 508 [1969]). Yet the Court of Appeals has declared that pre-trial hearings in New York are presumptively to be closed when an impartial jury is merely threatened by press commentary. It is clear that such a threshhold—and hence the presumption—will be established in every case in which the public shows a specific interest.

Moreover, the presumption of closure established by the New York Court is triggered by the publication of news. Thus, reluctant to provoke ejection, the press is "likely to feel some inhibition" at disseminating information concerning trials—an effect equally violative of the First Amendment. *Lamont v. Postmaster General,* 381 U.S. 301, 307 (1965). Somewhat ironically, the ultimate impact of the opinion below will be for the press simply to submit to "gag" orders. By monitoring pre-trial proceedings, albeit mutely, the press will at least be able to observe, in a timely manner, demeanor, inflection and "atmosphere" of the proceeding—all of which are often critical to comprehension of the event, yet incapable of being captured in a sterile transcript. The holding of *Nebraska Press* will indeed be an empty one if it may so readily be circumvented by an unrestricted, albeit creative, interference with access to traditionally public news sources.

Finally, the Court of Appeals, by "presuming" closure, has placed the burden of proof upon the press to justify its presence in the courtroom by demonstrating to the trial court a "legitimate public interest"[10] or an "overwhelming interest in keeping all proceedings open." (11a). Placing the burden on the press is "contrary to where . . . the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas,* 381 U.S. 532, 615 (1965) (Stewart, J., dissenting); *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958). Besides the more obvious financial and logistical considerations in such an allocation, it is one which the press is not in a position to sustain. Non-parties in general have no ready access to information relevant to a proceeding.[11] That principle is particularly true here, where the very purpose of closure is to *maintain* public ignorance of the substance of pre-trial hearings. The dilemma established by the Court of Appeals is apparent and virtually insurmountable.

4. There is a Practical Need for Clarification

The need for this Court to review this limited yet profound issue is emphasized by the clear conflict in appellate opinions both in this case and in others. While the court below has deemed closings to be a remedy of

[10]The Court has doubted the wisdom of "committing . . . to the conscience of judges" decisions as to what are "issues of 'general or public interest' " and which are not. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

[11]"The [allocation of the production burden of proof] has primarily a procedural consequence when evidence is available to both parties on the issue in question; it simply determines the order in which they shall put it in. Where, however, no evidence is available to a party on an issue, then the allocation to him of the production burden will mean that he loses upon that issue, and often upon the whole case." F. James, *Civil Procedure,* 254 (1965).

first resort,[12] other courts have held that the availability of a venue change is itself sufficient to defeat every request, based upon the threat of adverse publicity, to close a suppression hearing. *State ex rel. Dayton Newspapers, Inc. v. Phillips,* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). Still others have held that the press and public may be excluded from such a proceeding only if the party moving for an order of closure demonstrates a "substantial likelihood" that information prejudicial to the accused will reach potential jurors *and* its detrimental effect "cannot be avoided by alternative means." *Keene Publishing Corp. v. Keene District Court,* ..... N.H. ....., 380 A.2d 261 (1977).[13]

A similar conflict has developed among groups studying the issue. While the court below relied upon an early analysis sanctioning closure essentially on request (ABA Standards, Fair Trial and Free Press § 3.1 [1968]), the ABA Adjunct Committee on Fair Trial/Free Press has, since the decision in *Nebraska Press,* developed a standard which successfully accommodates the rights of the

[12]*See, also, Philadelphia Newspapers Inc. v. Jerome,* ..... U.S. ..... (No. 77-308 January 9, 1978) (statute permitting closure of suppression hearing on request); *cf., United States v. Gurney,* 558 F.2d 1202, 1211 (5th Cir. 1977), *petition for cert. filed sub nom. Miami Herald Publishing Company v. Krentzman,* 46 U.S. L.W. 3471 (U.S. January 16, 1978) (No. 77-1010).

[13]*See, also, United States v. Cianfrani,* Crim. No. 77-142 (E.D. Pa., November 16, 1977) (Becker, J.) (presumption of media access to suppression hearing can be overcome if standards of *Nebraska Press* are met); *State v. Allen,* 73 N.J. 132, 373 A.2d 377 (1977) (closure arguably is a prior restraint and hearing may be held in camera only if "serious and imminent threat to the integrity of the trial" is demonstrated and alternatives are shown to be not "feasible or proper") (dictum); *State ex rel. Gore Newspaper Company v. Tyson,* 313 So. 2d 777 (Fla. App. 1975), *rev'd on other grounds, English v. McCrary,* 348 So. 2d 293 (Fla. 1977).

press and public with those of a defendant.[14] ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press* §3.2 (Approved Draft, February, 1978); *see, also,* Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report on Free Press—Fair Trial, 21-22 (Comm. Print 1976).

Finally, even if it can be assumed that a decision of New York's highest court will not be followed in other jurisdictions, the impact of the Court of Appeals opinion will be striking.[15] The circulation of the 78 daily newspapers in New York State approaches 7,000,000, larger than in any other state and almost 11.5% of the daily circulation nationwide. There are, moreover, 404 weekly newspapers in New York,[16] which the decision below will perhaps most dramatically affect, since it is unlikely that they will be able to expend the resources required to assert their interest in opposition to closure. *Cf., Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 610 n. 40 (Brennan, J., concurring). The nature and extent of the injury potentially to be inflicted by the opinion below, unless corrected, is thus enormous.

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[14]"Except as provided below, the pre-trial hearing and its record shall be open to the public including representatives of the news media. . . . The presiding officer may close a . . . pre-trial hearing . . . only if: (1) the dissemination of information from the pre-trial hearing and its record would create a clear and present danger to the fairness of a trial; and (2) the prejudicial effect of such information on potential jurors cannot be avoided by alternative means [including]: (a) voluntary agreement with representatives of the news media; (b) continuance; (c) severance; (d) change of venue; (e) change of venire; (f) *voir dire*; (g) additional peremptory challenges; (h) sequestration of the jury; and (i) admonition to the jury."

[15]See *supra,* n. 6.

[16]Editor & Publisher Co., Inc., *1977 International Yearbook,* 21, 285-87 (1977).

5. The Procedure Under Which the Orders Were Issued is Improper

Exclusionary orders were issued by the trial court without advance warning, and the hearing concluded before attorneys for the press could be heard in opposition. The appellate courts below agreed that a hearing in such situations should be afforded (11a, 27a), but due process requires more.

Adequate notice of an impending exclusion and an opportunity to be heard are necessary. *Carroll v. Princess Anne,* 393 U.S. 175 (1968). Particular findings of fact, based upon evidence adduced at the hearing, must be made which support the order and which demonstrate why alternative measures, less drastic than closure of a courtroom, would not cure the perceived injury. *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563. Finally, such orders should be stayed, if at all possible, pending an opportunity to seek expedited appellate review. *Cf., National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1977); Note, *Ungagging the Press: Expedited Relief From Prior Restraints on News Coverage of Criminal Proceedings,* 65 Georgetown L.J. 81 (1976).

6. The Case is Not Moot

Following the suppression hearing, but prior to the decision of the Appellate Division, the defendants pleaded guilty and the transcript of the suppression hearing was released (5a). Although the Court of Appeals ultimately dismissed the proceeding as technically moot (12a), it nevertheless retained jurisdiction to decide the merits of "far from an ordinary appeal [which] crystallizes a recurring and delicate issue of concrete significance both to

the courts and the news media" and which concerns matters that "typically evade review" (5a).[17]

For the reasons set forth by the Court of Appeals, and for those articulated in *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 546-47, the case is not moot and should be resolved by the Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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March 15, 1978

[17]The Court is not bound by the mootness determination of the Court of Appeals. *Liner v. Jafco, Inc.*, 375 U.S. 301 304 (1964).

Certificate of Service

I hereby certify that on this 16th day of March, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Bernard Kobroff, Esq., c/o State of New York, Bureau of Prosecution and Defense Services, Division of Criminal Justice Services, 80 Centre Street, New York, New York 10013, Counsel for Respondents. I further certify that all parties required to be served have been served.

/s/ ROBERT C. BERNIUS
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Rochester, New York 14603
Attorney for Petitioner

APPENDIX

Order of State of New York Court of Appeals Denying Motion for Reargument, Entered January 12, 1978

STATE OF NEW YORK

COURT OF APPEALS

January 12, 1978

Mo. No. 22

IN THE MATTER

OF

GANNETT CO., INC.,

Respondent,

vs.

HON. DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and WALTER J. WARD, as District Attorney of Seneca County,

Appellants.

Motion for reargument denied.

Gabrielli, J., taking no part.

Opinion and Judgment of State of New York Court of Appeals, Entered December 19, 1977

IN THE MATTER

OF

GANNETT CO., INC.,

Respondent,

v

DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, *et al.*,

Appellants.

Argued October 12, 1977; decided December 19, 1977

OPINION OF THE COURT

WACHTLER, J.

[374] During the course of pretrial suppression hearings in a highly publicized murder case, the court directed that the evidentiary proceedings be closed to the public, including the press. The closure order was imposed as a means to ensure the defendants' right to a fair trial by forestalling the prejudicial effects of further notoriety. In this article 78 proceeding in the nature of prohibition, the petitioner, a disseminator of news through press and television, claims that the court's action violated First Amendment guarantees and the Sixth Amendment right to a public trial. In what is hardly a novel conflict, its claim presents an open issue within the "free press—fair trial" controversy (see *Matter of Oliver v Postel,* 30

NY2d 171, 183; *Matter of United Press Assns. v Valente,* 308 NY 71, 85; cf. *Nebraska Press Assn. v Stuart,* 427 US 539, 564, n 8).

This claim to unrestricted media access to criminal proceedings of public interest stems from an unusual matter locally known as "the Clapp murder case". Wayne Clapp was a former town policeman. He had lived his entire 42 years in the Rochester area and had developed deep ties in the surrounding rural communities. On July 19, 1976, he was reported missing.

According to reports in the news media, including the petitioner's two daily papers and Rochester television station, Clapp had last been seen leaving Roy's Marina accompanied by two unidentified youths. His boat had later been returned, laced with bullet holes. But his pickup truck and .357 magnum revolver, along with the two strangers, had vanished. Divers began searching Seneca Lake for Clapp's remains. The body of the deceased, however, was never recovered.

On July 22, the media announced that a nationwide police alert for Clapp's truck had proved successful. Michigan police had spotted the vehicle and, after a three-hour chase requiring helicopters and tracking dogs, they arrested a 16-year-old Texas youth, Kyle Greathouse, and his 21-year-old traveling companion, David Jones. The next day, front page articles revealed that Greathouse, apparently acquiescing to police requests, had led Michigan authorities to the location where he had buried the stolen revolver. The press later reported, without expanding, that the suspects had made admissions or [375] confessions before waiving extradition proceedings and being returned to New York.

A Seneca County Grand Jury returned a lengthy indictment charging the two youths with second degree murder and robbery. On August 6, petitioner's morning daily reported that the accused "pleaded innocent yesterday • • • at their arraignment before Seneca County Court Judge

Daniel De Pasquale. 'Not guilty, your honor,' the 16-year-old Greathouse answered * * * Jones gave the same response."

At the commencement of a pretrial suppression hearing, defense attorneys argued that an unabated buildup of adverse publicity had already jeopardized their clients' ability to receive a fair trial. To minimize the prejudicial effects of further disclosures, they asked that the pretrial proceedings be held *in camera*. The District Attorney had no objections. In an oral ruling, the court concluded that "these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial * * * Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for those reasons the court is going to grant both [defendants'] motions." The public, including the petitioner's staff reporter, were removed from the courtroom. The suppression hearing then commenced and continued *in camera* to its conclusion the next day.

Three days later, counsel for Gannett appeared and asked the County Court to reconsider and vacate its ruling *nunc pro tunc*. Since the proceedings had already been concluded, a copy of the hearing transcript was also requested. While finding this intervention untimely, the court accommodated the asserted public interest. It signed Gannett's show cause order directing both the defense and the People to justify withholding the transcripts. The issues were fully briefed, and on November 16, the merits were argued. But the advantages of hindsight and further debate only reinforced the court's initial determination that open suppression hearings, if exposed to notoriety, would have deprived Greathouse and Jones of any meaningful opportunity to receive a fair trial. The court's original finding of "a reasonable probability of prejudice to the defendants" not only justified closure in the first instance but, in the Trial Judge's view, applied with equal force to the request for transcripts as well.

The Appellate Division disagreed and, while trial in the [376] criminal proceeding was still pending, granted the petitioner's renewed request for access to the sealed records. Its *Per Curiam* decision, while purporting to resolve what had already become an academic dispute,[1] has nonetheless provided a conduit through which critical aspects of the "free press—fair trial" controversy have been presented for review.

We would ordinarily decline the invitation and dismiss the appeal, taken by the respondents in the article 78 proceeding, for mootness. But this is far from an ordinary appeal. It crystallizes a recurring and delicate issue of concrete significance both to the courts and the news media. And in its broadest implications, it presents a challenge to a fundamental precept of judicial administration—the courts' inherent power to control their own process. For these reasons, combined with the fact that matters of this character typically evade review, we have retained jurisdiction to entertain the appeal (see *Matter of Oliver v Postel*, 30 NY2d 171, 178, *supra; Matter of United Press Assns. v Valente*, 308 NY 71, 76, *supra;* cf. *East Meadow Community Concerts Assn. v Board of Educ.*, 18 NY2d 129, 135; *Matter of Rosenbluth v Finkelstein*, 300 NY 402, 404; see, generally, Cohen and Karger, Powers of the New York Court of Appeals, pp 420-421).

Criminal trials are presumptively open to the public, including the press. Public access is secured through a fundamental concept said to be rooted in distrust for secret tribunals—the inquisition, star chamber and *lettre de cachet* (*Matter of Oliver*, 333 US 257, 268-270). It is typically the defendant, however, who reminds us on appeal from cases of compelled closure that the right to a public trial is a

[1]The transcripts had already been offered for the petitioner's use. The need for sealing them had disappeared after co-defendants Greathouse and Jones, in satisfaction of the indictment pending against them, pleaded guilty to lesser included crimes.

constitutional guarantee which "the accused shall enjoy" (US Const, 6th Amdt; Civil Rights Law, § 12; former Code Crim Pro, § 8; see, e.g., *People v Hinton,* 31 NY2d 71, cert den 410 US 911). It is after all the defendant whose right to a "fair trial in a fair tribunal" (*Matter of Murchison,* 349 US 133, 136; *People v McLaughlin,* 150 NY 365, 375) and whose very liberty is in jeopardy. And because it is the defendant who suffers directly when wrongfully deprived of public vigilance against possibly unjust prosecution or potential abuse (or nonuse) of judicial discretion, the right to insist on a public trial is primarily that [377] of the accused (*Matter of Oliver, supra,* at pp 268-271; *United States v Sorrentino,* 175 F2d 721, 722-723; compare *People v Jelke,* 308 NY 56, with *Matter of United Press Assns. v Valente,* 308 NY 71, 80-81, *supra*).

In practice, this priority need not detract from the public's general interest in the assurance of fair as well as effective enforcement of its laws. Though somewhat attenuated in comparison with a defendant's self-interest, each of us shares a stake in an adversary system which consistently dispenses our penal laws impartially (US Const, 5th, 6th, 14th Amdts; NY Const, art I, §§ 2, 6), free from needless prejudicial publicity (see, e.g., *Sheppard v. Maxwell,* 384 US 333). Ordinarily, public trials "serve to instill a sense of public trust in our judicial process" (*People v. Hinton, supra,* at p 73). But this assumes that public access in a given case poses "no threat or menace to the integrity of the trial" (*Craig v Harney,* 331 US 367, 377). Because this assumption sometimes fails, neither the public nor the press has an absolute right to attend all stages of all criminal trials (e.g., *Estes v Texas,* 381 US 532, 538; *Matter of United Press Assns. v Valente, supra,* at p 81). Particularly where a fair trial may hang suspended in the balances, the Constitution should not be considered as a substitute for a sunshine law (see Public Officers Law, §§ 85-89, as amd by L 1977, ch 933; Freedom of Information Act, US Code, tit 5, §552).

The public's right to demand access to criminal trials, let alone suppression hearings, was never intended to comprehend outside interference with orderly judicial process. The public trial concept has therefore "never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice" (*People v Jelke, supra,* at p 63; accord *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937). To this end, the inherent power to limit public access has become a common and integral aspect of due process in trials for particularly sensitive crimes (Judiciary Law, § 4) or, for instance, where closure is necessary to protect a witness' identity (*People v Hinton,* 31 NY2d 71, 73, *supra*), or life (*People v Hagan,* 24 NY2d 395, cert den 396 US 886) or delicate emotional state (*People v Smallwood,* 31 NY2d 750; *United States ex rel. Smallwood v* [378] *La Valle,* 377 F Supp 1148, affd 508 F2d 837, cert den 421 US 920).[2] Of course, the policies underpinning closure in these matters dictates the sealing of documents and transcripts as well (e.g., Domestic Relations Law, §235). And in all of these cases, the remedy—legislative or judicial—has called for "a sensitive and wise balancing of the rights of the individual defendant and the interests of the public" (*People v Darden,* 34 NY2d 177, 181-182).

In other words, we encourage accountability through public legal proceedings and the truthful reporting of whatever transpires in open court (see Civil Rights Law, §74),

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[2]Secrecy is also the rule in Grand Jury hearings for felony cases (CPL 190.25; see *People v Miller,* 257 NY 54), professional disciplinary investigations and proceedings (Judiciary Law, § 90; see *Matter of Nichols v Gamso,* 35 NY2d 35), matrimonial actions (*Shiles v News Syndicate Co.,* 27 NY2d 9; *Danziger v Hearst Corp.,* 304 NY 244) and Family Court proceedings (e.g., Family Ct Act, §1043; 22 NYCRR 2830.8).

but "[only] so far as that object can be attained without injustice to the persons immediately concerned" (*Estes v Texas, supra,* at p 542, quoting 2 Cooley's Constitutional Limitations, p 931 [Carrington ed, 1927]). Having imposed on the Trial Judge an affirmative obligation to ensure this balance (*Sheppard v Maxwell, supra,* at pp 352-363; *Irvin v Dowd,* 366 US 717), it would be anomalous indeed to withhold the discretionary power necessary to achieve it.

In the case now before us, the Trial Judge was not presiding over a trial on the merits. His concern was with a suppression hearing which, of course, is "not within the specific meaning of 'trial'" (*People v Anderson,* 16 NY2d 282, 288; see *Maurer v People,* 43 NY 1, 3; *Hopt v Utah,* 110 US 574). The court at this stage was not yet forced to insulate an already impaneled jury from extrinsic and inadmissible evidence of guilt (see *Murphy v Florida,* 421 US 794; *Gonzales v Beto,* 405 US 1052; *Parker v Gladden,* 385 US 363; *Jenkins v United States,* 380 US 445). Its task instead was to ensure that further pretrial publicity would not impermissibly alter a defendant's status in the public eye from that of a suspected killer to that of a confessed murderer.

Before any challenged evidence could be submitted to a jury, due process required the Trial Judge to fully and independently resolve, as a matter of law, that the evidence was not obtained in violation of the fundamental constitutional rights of the accused (e.g., *Miranda v Arizona,* 384 US 436, 467; *Jackson v Denno,* 378 US 368, 394; *Mapp v Ohio,* 367 US [379] 643; *People v Huntley;* 15 NY2d 72, 78). Knowing how damaging the introduction of this evidence could be to a defendant, and that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt (e.g., *Sheppard v Maxwell,* 384 US 333, *supra*), we require the Trial Judge to ensure that tainted evidence never see the light of day (CPL 710). Suppressed evidence should not be used to determine a defendant's

guilt, not at trial and certainly not before trial through publication of illegally obtained evidence by the media, whose credibility is the envy of many institutions (see *United States v Nixon,* 418 US 683, 714). At their option, the defendants could have later challenged before a jury the voluntariness of their confessions. But this choice is for the accused, not the press.

Defendants Greathouse and Jones sought to invoke these constitutional norms, not by excluding the public or the press from a highly sensationalized murder trial, but rather by excluding allegedly tainted evidence of guilt. The petitioner nonetheless urges us to rule that the trial court's protective order, however well intentioned, was a nullity in the face of the media's superior right to be free from prior restraint on publication (US Const, 1st Amdt; NY Const, art I, § 8).

To be sure, when a restraint is imposed to prevent commentary on known facts about a pending criminal case, tensions between First and Sixth Amendment rights are greatest. The Supreme Court in *Nebraska Press Assn. v Stuart* (427 US 539, 570, *supra*) agreed that "the barriers to prior restraint remain high". In that case, a "gag order" modified by the Nebraska Supreme Court prohibited the press from reporting or commenting on judicial proceedings which had been held in open court. Reporters had attended the "public event"; they had seen and heard what transpired. To prevent dissemination of that highly prejudicial information, the State court purported to restrain all news reports of "confessions or admissions • • • and other information strongly implicative of the accused as the perpetrator of the slayings" (*State v Simants,* 194 Neb 783, 801). Because "[t]hose who see and hear what transpired can report it with impunity" (*Craig v Harney,* 331 US 367, 374, *supra;* see *Oklahoma Pub. Co. v District Ct.,* 430 US 308, 311; *Nebraska Press Assn. v Stuart, supra,* at p 568; *Sheppard v Maxwell, supra,* at pp 362-363), the restrictive order

was subject to a "heavy presumption against" prior restraint and was ultimately condem[380]ned as "clearly invalid" (*Nebraska Press Assn. v Stuart, supra,* at p 570).

This, of course, does not mean that trial courts are left powerless to stem improper revelation of facts that would present an imminent threat to the impaneling of a constitutionally impartial jury. In fact, as an additional alternative to a trial court's "benign neglect" outlined in *Sheppard v Maxwell* (*supra,* at pp 357-362), the majority in *Nebraska Press* left open the prophylactic adopted in the case at bar—"[c]losing of pretrial proceedings with the consent of the defendant" (*Nebraska Press Assn. v Stuart, supra,* at p 564, n 8; see p 576, n 3; p 584, n 11 [BRENNAN, J., concurring]). Continuance, extensive *voir dire* examinations, limiting instructions or venue changes may prove paltry protection for precious rights (see, e.g., Jury System in America [Simon ed, 1975]). Reversals and new trials are hardly acceptable alternatives. The extent of the media's right to access should not remain unresolved, for it places in issue the very integrity of our courts.

To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced. To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings (see ABA Standards Relating to the Administration of Criminal Justice, Pretrial Hearings, § 3.1, p 203 [1974]). At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.

As the locus of public interest, this determination is to rest with the hearing Judge. Of primary consideration is

the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial. This concept is premised on the right to an impartial jury as the arbiter of guilt or innocence. To maintain that right, the hearing Judge must have the means to ensure that prospective veniremen do not hear matters from which, by law, they should be insulated.

This was precisely the problem confronting the hearing Judge in the case at bar. The public knew that co-defendants [381] Greathouse and Jones had been caught "red-handed" by Michigan police with fruits of the crime. And it was widely known that the defendants had made incriminating statements before being returned to this State. The details, however, were not known, and public curiosity was intense. To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.

In so doing, the courts should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest. This may be found to outweigh the risks of premature disclosures. In trials involving public officials, for instance, the public may have an overwhelming interest in keeping all proceedings open.[3]

That level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred

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[3]Whereas the obligation of nondisclosure in pretrial hearings is for the purpose of insulating prospective veniremen, in certain other situations, such as those involving the identification of an informer, total preclusion from any public knowledge may be called for (cf. *People v Darden*, 34 NY2d 177, *supra; People v Goggins*, 34 NY2d 163).

out of State. The interest of the public was chiefly one of active curiosity with respect to a notorious local happening. While the defendants were still in jeopardy, any true public interest could be fully satisfied, consonant with constitutional free press guarantees, by affording the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing (cf. *Department of Air Force v Rose*, 425 US 352, 370-382). Complete transcripts were made available when the defendants' interests were not longer in jeopardy. The public's "right to know" was then compatible with the defendants' right to a fair trial.

This conclusion would ordinarily lead to a reversal inasmuch as the Appellate Division had directed full pretrial disclosure. As noted, however, since the questions presented by this appeal became moot when the pleas were entered, and the relief requested would now serve no purpose, the judgment appealed from should be modified, without costs, to the extent of dismissing the petition solely for that reason.

[382] Cooke, J. (dissenting). I dissent and vote to affirm the judgment of the Appellate Division.

While court closures may be employed at times for narrowly circumscribed purposes, in this instance invocation of this drastic remedy, without notice, without a hearing, and without substantiation of a clear and present State necessity, abridged the rights of the press to report true accounts of public proceedings and deprived the public of a free flow of information in which they have a great interest. In the absence of compelling necessity, public scrutiny of the administration of justice and the effectiveness of law enforcement agencies cannot be foreclosed.

Petitioner corporation owns and operates two dailies and a television station in the Greater Rochester area. With public attention focused upon the suspicious circumstances surrounding the mysterious disappearance of

former Brighton, New York, policeman Wayne Clapp in July, 1976 and the subsequent apprehension and extradition of his alleged slayers, 21-year-old David R. Jones and his 16-year-old companion, Kyle E. Greathouse, in the State of Michigan six days later, petitioner's newspapers and television studios devoted a great deal of time, manpower and resources to report the investigation of the case and the pretrial proceedings. The notoriety of the crime was heightened by the failure of the police to recover Wayne Clapp's body from Seneca Lake where, allegedly, it had been dumped after the murder.

When, however, petitioner's reporter Carol Ritter appeared to observe the suppression hearing on November 4, 1976, both defendants, without prior notice, joined in an oral motion to exclude the press and public from the courtroom. Without insisting upon notice to the press and without directing a hearing on the application, the County Court summarily granted the application. "The Court: [S]ince these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter * * * [c]ertain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant".

On advice of counsel, petitioner's reporter requested in writing a postponement of the suppression hearing in order to afford the news media's attorneys an opportunity to appear and prepare argument against the order of closure. Upon denial, petitioner moved by order to show cause, dated Novem[383]ber 8, 1976, to vacate the closure order so that petitioner's employees could gain access to the transcripts of the hearing. Although the court conceded, at argument on the motion, that it was regrettable that counsel for the petitioner had not been in court when the motion for closure was made, the court denied the application and adhered to its prior order. In rejecting petitioner's contention that the effect of the order was to deprive the press of its First Amendment function, the

court reasoned that the case was unique, that a reasonable probability of prejudice was a consequence of the publication of the happening of the suppression hearing, and that the defendants, as movants for an order of closure, did not bear the burden of establishing prejudice.

Thereafter, petitioner commenced this article 78 proceeding in the Appellate Division, Fourth Department, to prohibit enforcement of County Court's order. The Fourth Department unanimously sustained the petition, vacated the order of closure and enjoined its enforcement, holding: "The exclusionary order entered by the County Court is not supported by a showing of compelling factual circumstances. * * * No finding was made concerning the extent of pretrial coverage in the case, the impact which the disclosures would be expected to produce, the size of the prospective jury pool in Seneca County nor as to any other matter that would indicate with a reasonable amount of certainty that the defendants could not receive a fair trial in Seneca County without a closed *Huntley* hearing. The closure order entered here lacks the requisite factual basis necessary to overcome the right of the public and press to open judicial proceedings" (55 AD2d 107, 110).

On appeal to this court, appellants urge that there exists a fundamental distinction between the prohibited blanket "gag" order (see *Nebraska Press Assn. v Stuart,* 427 US 539) and a direction to close the courtroom doors. Unlike the "gag" order which bars the press from reporting matter which is otherwise open to the public, the closure order merely regulates access to information and does not prohibit dissemination of any news. The government, appellants maintain, may have no right to interpose a prior restraint on publication, but it certainly has no duty to supply the press with access to information. Further, it is urged that courts have inherent power to preserve order and decorum and to protect the rights of parties and witnesses.

To be sure, the trial court has a wide range of powers at its [384] disposal to assure a fair trial to the parties affected, but the power to isolate judicial proceedings from the scrutiny of the public, absent compelling State necessity, is not numbered among them. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions * * * are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government" (*Cox Broadcasting Corp. v Cohn,* 420 US 469, 492; *Estes v Texas,* 381 US 532, 541-542). In light of *Nebraska Press,* this court can hardly deny the media's right and obligation to report on the function of judicial tribunals. By the same token, the premise that there is any significant difference in denying access to information about a matter of public interest—upon undocumented, unproven, and conclusory allegations of possible prejudice—assumes that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it. Any such distinction is without substance, since the right of free expression must encompass both the freedom to *convey* information about a public matter and the liberty to gain *access* to proceedings involving the same. A closed proceeding should be recognized for what it is—a "serious backdoor threat to First Amendment interests" (Staff of Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong, 2d Sess, Free Press—Fair Trial [1976]).

This court's recognition of an exclusion order as a general prophylactic against the influence of unknown and undocumented prejudices upon the tribunal's deliberative function suggests an almost casual acceptance of a prior burden on the freedom of the press, a burden presumptively repugnant to the ends of the First Amendment (see *Bantam Books v Sullivan,* 372 US 58, 70). The effectiveness of such an order cannot be seriously doubted,

but the right to report the news is too vital to the nature of a free State to allow the press to be stifled under the pressure of direct "gag" orders, or even more subtle means of accomplishing the same illicit end (*Near v Minnesota ex rel. Olson,* 283 US 697, 713-714): "[*S*]*peech concerning public affairs* is more than self-expression; it *is the essence of self-government.* The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, [385] caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co. v Sullivan,* 376 U.S. [254], at 270." (*Garrison v Louisiana,* 379 US 64, 74-75 [emphasis added].) Absent compelling and overriding State necessity, the right of the public to gain information about public matters may not be infringed (*Schenck v United States,* 249 US 47, 52; *Brandenburg v Ohio,* 395 US 444).

The necessity for public inspection is not diminished because the proceeding is a pretrial hearing to suppress evidence illegally obtained. Suspicion enshrouds whatever determination is not freely aired in a forum open to public inspection, scrutiny and, sometimes, even scorn. The public has the right to know that the Constitution protects equally each person accused of a crime, and has the right to scrutinize the effectiveness of police agencies in coping with criminal activity. "[T]he testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign, should not be given in secret" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 606).

At times, the public interest may command otherwise. Thus, it has been held that necessity demands that the doors of the courtroom be closed for the protection of

undercover agents (*People v Hinton,* 31 NY2d 71, 74; *People v Hagan,* 24 NY2d 395; *People v Garcia,* 51 AD2d 329, affd 41 NY2d 861; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937), for the protection of witnesses who might be unduly inhibited from or embarrassed by relating the substance of their testimony in front of an audience (*People v Jelke,* 308 NY 56, 63; *People v Hall,* 51 App Div 57; Cook, Constitutional Rights of the Accused: Trial Rights, § 101), and for the preservation of public sensibilities (*Matter of Oliver v Postel,* 30 NY2d 171, 179; *Matter of United Press Assns. v Valente,* 308 NY 71; *People v Jelke, supra;* see, also, *People v Nicholas,* 35 AD2d 18). However, under these circumstances, closure does not contemplate the isolation of the tribunal from its milieu to diminish the possible effects of feedback from the community upon the ultimate disposition. Rather, it seeks to protect the actors in the controversy from personal repercussions which the law deems serious enough to warrant extraordinary precaution or, in the case of matter offensive to public sensibility, to preclude dissemination under a judicial aegis of unlawful material in which, *ab initio,* the general public has [386] no legitimate interest. Nevertheless, "any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 607, *supra; United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274, cert den 423 US 937, *supra; People v Devine,* 80 Misc 2d 641, 644).

The guidelines expressed by the majority signal the common, if not certain, locking of the courtroom door virtually whenever requested in pretrial hearings. To allow closure on the mere showing that press commentary would "threaten" the impaneling of an impartial jury (p 380) affords almost no protection to First Amendment

rights for the simple reason that in cases of notoriety it will always be possible to show some risk of prejudice. Of greater concern, however, is that the majority has turned the burden of proof around. In *Nebraska Press Assn. v Stuart* (427 US 539, *supra*), the Supreme Court commented that "[t]he record demonstrates, as the Nebraska courts held, that there was *indeed a risk* that pretrial news accounts, true or false, would have some *adverse impact* on the attitudes of those who might be called as jurors" (427 US, at pp 568-569 [emphasis added]). Nevertheless, the court concluded that a sufficient showing had not been made that "alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary" (at p 569). In so determining, however, the court reasoned that "our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied" (at p 569). In contrast, the majority here instead of demanding a heavy burden of showing that alternatives to closure cannot insure a fair trial, requires a determination of the "magnitude of any genuine public interest" (p 381). This presumes that the press should be excluded and discourages use of alternatives to closing the courtroom. In effect, this procedure suggests that any pretrial publicity automatically produces an unfair trial—a proposition expressly rejected by the Supreme Court (see 427 US, at p 565).

By acceding to defendants' motion for closure in this instance, the County Court exceeded its very limited power to exclude the press and public and overlooked a clear command [387] to preserve the right to a fair trial at a less drastic cost than shutting off channels of legitimate public information. Although the right of the defendant to a jury unbiased by the determination at the *Huntley*

hearing has been repeatedly recognized in the courts (e. g., *Lego v Twomey,* 404 US 477, 483-486; *Pinto v Pierce,* 389 US 31; *Jackson v Denno,* 378 US 368; *People v Huntley,* 15 NY2d 72; *People v Hulett,* 28 AD2d 624, affd 22 NY2d 696, cert den 393 US 1097; *People v Brainard,* 56 AD2d 633; *People v Higgins,* 28 AD2d 1016; *People v Cornell,* 28 AD2d 1166; *People v Pratt,* 27 AD2d 199) here County Court dictated a draconian measure without proof of abject necessity. Before resorting to this ultimate restriction, the trial court was obliged to exercise "ability and ingenuity * * * to devise appropriate steps, *within constitutional limits,* to protect a defendant in his right to a fair trial" (*Matter of New York Times Co. v Starkey,* 51 AD2d 60, 66 [concurring opn, SHAPIRO, J.; emphasis added]; see, also, *Matter of Hearst Corp. v Cholakis,* 54 AD2d 592, 593). Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods—venire, continuance, instructions, admonitions to witnesses, and parties and counsel, sequestration of the jury, or change of venue—would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment (*Nebraska Press Assn. v Stuart,* 427 US 539, 569, *supra;* see, also, concurring

opn of Mr. Justice POWELL, at p 571; *Branzburg v Hayes*, 408 US 665, 685; *Sheppard v Maxwell*, 384 US 333, 362-363).

It is no answer to suggest that the right to a public trial is waivable at the option of the accused. As the right of a public trial knows no correlative right to a private one (see *Singer v United States*, 380 US 24, 34-35; Cook, Constitutional Rights of the Accused: Trial Rights, § 103), such a waiver cannot [388] automatically close the court. "A trial is a public event. What transpires in the court room is public property • • • There is no special perquisite of the judiciary which enables it • • • to suppress, edit, or censor events which transpire • • • before it" (*Craig v Harney*, 331 US 367, 374).

Accordingly, the judgment of the Appellate Division should be affirmed.

Chief Judge BREITEL and Judges JASEN and JONES concur with Judge WACHTLER; Judge COOKE dissents and votes to affirm in a separate opinion in which Judge FUCHSBERG concurs; Judge GABRIELLI taking no part.

Judgment modified, without costs, in accordance with the opinion herein and, as so modified, affirmed.

Opinion of State of New York, Supreme Court, Appellate Division—Fourth Department Entered December 17, 1976

IN THE MATTER

OF

GANNETT CO., INC.,

Petitioner,

v

DANIEL A. DEPASQUALE, as Judge of the Seneca County Court, *et al.*,

Respondents.

Per Curiam. Petitioner Gannett Co., Inc. seeks an order of prohibition pursuant to CPLR article 78 vacating and prohibiting enforcement of two orders of the Seneca County Court which excluded the public and press from a pretrial *Huntley* [108] hearing in a criminal prosecution involving two defendants charged with murder.

Petitioner owns and operates two daily newspapers and one television station in the Rochester area. In the course of its news reporting activities petitioner assigns reporters to cover criminal proceedings that are expected to generate interest among the general public. People v Kyle Edwin Greathouse and Davis [*sic*] Ray Jones is one such proceeding currently in the pretrial stage in Seneca County. Defendants Greathouse and Jones were indicted for the crimes of murder, robbery and larceny. It was alleged in the indictment that Greathouse and Jones robbed and murdered a fishing companion and dumped the victim's body into Seneca Lake. Thereafter the defendants fled the jurisdiction and were eventually arrested in Michigan. Sub-

sequently they were returned to New York to face criminal charges. The case against the defendants is somewhat unique in that the alleged victim's body had not been recovered when the indictments were returned, and the record indicates that the corpus of the alleged victim is still missing. Another unusual circumstance is that one of the defendants is 16 years old.

The defendants subsequently filed a motion pursuant to CPL article 710 to suppress certain statements attributed to them. The *Huntley* hearing was conducted before Honorable DANIEL A. DEPASQUALE, Seneca County Court Judge, who ordered that the hearing be closed to the public and press upon the request of the defendants. In the first order the court gave as its reasons for closure that the *Huntley* hearing "is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions". During the hearing petitoner sought a postponement to argue its right to be present and to have access to transcripts of the completed portion of the hearing. Petitioner's request was denied and the hearing remained closed. Thereafter petitioner moved to vacate the closure order *nunc pro tunc* and for immediate access to the completed stenographic transcripts of the suppression hearing. The County Court once again denied the relief requested "on the theory that under the special and unusual circumstances—one of these two defendants being 16 years of age—that there was a reasonable probability of prejudice to the defendants, and the Court therefore found it necessary to [109] grant the motion". Petitioner is now seeking to vacate and prohibit enforcement of both the oral order of closure and the subsequent written order which denied petitioner's motion to vacate the closure order *nunc pro tunc* and for immediate access to the transcripts of the hearing.

This proceeding presents a basic conflict between petitioner's First and Sixth Amendment right to attend criminal proceedings and publish information with regard thereto and the constitutional right of the defendants to receive a fair trial before an impartial jury. The issue is whether the public and representatives of the news media may be excluded from a pretrial suppression hearing concerning the voluntariness of alleged confessions and admissions on the ground that an open hearing would create a reasonable probability of prejudice to the defendants.

The accused in a criminal prosecution has a constitutional right to a public trial (US Const, 6th Amdt; *Duncan v Louisiana,* 391 US 145; see, also, *Matter of Oliver v Postel,* 30 NY2d 171; Judiciary Law, § 4; Civil Rights Law, § 12). But the public trial guarantee does not inure to the benefit of the accused alone. The public has a vital interest in open judicial proceedings, especially criminal proceedings, to insure that the integrity of the judicial process remains intact. Public trials "serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet*" (*People v Hinton,* 31 NY2d 71, 73; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, cert den 423 US 937). "The searchlight of a trial which is open to the public serves as a restraint against the abuse of judicial power" (*United States ex rel. Bennett v Rundle,* 419 F2d 599, 606; *Matter of Oliver,* 333 US 257, 270; *People v Jelke,* 308 NY 56, 62). "A trial is a public event. What transpires in the courtroom is public property" (*Craig v. Harney,* 331 US 367, 374).

Precisely because "the public at large has a vital stake in the concept of a public trial" (*People v Hinton, supra,* p 73), the circumstances under which a trial court may order closure have been closely circumscribed. Closure is permitted only in "unusual circumstances" (*People v Hinton, supra*) or upon a clear showing that such an order

is required to prevent "a serious and imminent threat to the integrity of the trial" (*Matter of Oliver v Postel, supra,* citing *Craig v Harney,* 331 US 367, 373, 377, *supra;* see *Matter of Hearst Corp. v Cholakis,* [110] 54 AD2d 592). A closed trial order "constitutes an exception to the general rule requiring open judicial proceedings * * * and may only be employed as a response to compelling factual circumstances. The discretionary judgment which bars the doorway to a courtroom must be 'sparingly exercised and then, only when unusual circumstances necessitate it' (*People v Hinton,* 31 NY2d 71, *supra* * * * *People v Devine,* 80 Misc 2d 641)" (*Matter of Gannett Co. v Mark,* 54 AD2d 818, 819). An exclusionary order must be supported by a factual showing of prejudice to the defendant (*Matter of Hansen v Kelly,* 38 AD2d 722). Where no showing of prejudice has been made, an order closing the courtroom is inappropriate and must be vacated (*Matter of Hearst Corp. v Cholakis, supra*). The guiding principle is that a court is a public facility from which the public and press cannot be excluded except when there is a showing of a compelling reason for such action (*Matter of Gannett Co. v Mark, supra*).

The exclusionary order entered by the County Court is not supported by a showing of compelling factual circumstances. Respondent DePasquale indicated that the reason for closure was the reasonable probability of prejudice to the defendants. The only factual reason given is that one of the defendants is 16 years of age. There is no further reason given. No finding was made concerning the extent of pretrial coverage in the case, the impact which the disclosures would be expected to produce, the size of the prospective jury pool in Seneca County nor as to any other matter that would indicate with a reasonable amount of certainty that the defendants could not receive a fair trial in Seneca County without a closed *Huntley* hearing. The closure order entered here lacks the requisite factual basis necessary to overcome the right of the public and press to open judicial proceedings.

There is a second infirmity in the County Court order which overshadows the right of the public to open judicial proceedings. The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference. It is clear that a closed trial order restricts media access to information ordinarily made available to the general public. By denying access to the media a Trial Judge can effectively prevent the publication of testimony or other information deemed prejudicial to the accused. It is this feature of the instant closed trial order that is [111] attacked by petitioner as an infringement upon its First Amendment rights. Logic compels the conclusion that where an exclusionary order is entered merely as a substitute for a "gag order" which would otherwise place a direct restraint on what the press can publish, such exclusionary order infringes upon protected First Amendment rights. An exclusionary order is merely a substitute for a direct prior restraint where, as here, the sole purpose behind the order is to *prevent the publication* of what transpires in the courtroom during a pretrial hearing.

The fact that such an order "constituted a novel form of censorship cannot insulate or shield it from constitutional attack" (*Matter of Oliver v Postel,* 30 NY2d 171, 183, *supra*). "In the area of 'indispensable' First Amendment liberties, the Supreme Court has been careful 'not to limit [their] protection * * * to any particular way of abridging it' (*Grosjean v American Press Co.,* 297 U.S. 223, 249; see, also, Communications Assn. v. Douds, 339 U.S. 382, 402; *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461), since 'abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' (*N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461, *supra.*)". Where an exclusionary order is directed at the press to prevent the publication of material prejudicial to the defendant, First Amendment rights are abridged to the same

degree as in the case of a "gag order" directing the press not to publish the asserted prejudicial information.

The County Court excluded the public and press from the *Huntley* hearing due to the reasonable probability of prejudice to the defendants inherent in conducting an open proceeding. The prejudice to which the County Court was referring was the possibility that massive pretrial publication of the defendants' confessions and incriminating statements would infect prospective jurors with such prejudice against the defendants, conscious or unconscious, that they could not receive a fair trial in Seneca County. (See *People v Pratt,* 27 AD2d 199.) While this possibility certainly exists, the purpose behind the exclusionary order unmasks it as a substitute for a gag order that would otherwise place a direct restraint on the right of the press to publish.

Prior restraint on speech and publication is "the most serious and least tolerable infringement on First Amendment rights" (*Nebraska Press Assn. v Stuart,* 427 US 539, 559). [112] "[O]nly the most exigent circumstances warrant the issuance of an order curtailing the right of the press to publish. All other measures within the power of the court to insure a fair trial must be found to be unavailing or deficient" (*Matter of New York Times Co. v Starkey,* 51 AD2d 60, 64). The reviewing court must examine the evidence before the Trial Judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. The reviewing court should then consider whether the record supports the entry of a prior restraint on publication (*Nebraska Press Assn. v Stuart, supra,* p 562).

Applying these standards to the order under review we find that the "heavy burden imposed as a condition to

securing a prior restraint" has not been met here (*Nebraska Press Assn. v Stuart, supra,* p. 570). Respondent made no findings with regard to the nature and extent of pretrial news coverage. Nor did Judge DePasquale inquire into whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity. And no determination was made as to how effectively the exclusionary order would operate to prevent the threatened danger (*Nebraska Press Assn. v Stuart, supra,* pp 562-567). The record in the instant case clearly does not support the entry of respondent's restrictive order barring the public and press from the defendants' *Huntley* hearing. The reasons set forth by the County Court cannot justify the violation of First Amendment rights evident here.

Petitioner has also asserted a due process right to notice and a hearing prior to the entry of exclusionary orders which are directed at the press to prevent the publication of matters prejudicial to the defendant in a criminal proceeding. Such rights have been accorded to the press in cases involving direct prior restraints (*Matter of New York Times Co. v Starkey, supra; United States v Schiavo,* 504 F2d 1), and similar rights should be accorded to the press where a trial court contemplates entering an exclusionary order for the purpose of suppressing pretrial publicity deemed prejudicial to the defendant.

The record shows that the closure order under review was entered specifically to prevent petitioner from disseminating the inherently prejudicial disclosures that inevitably follow [113] from a *Huntley* hearing. Respondent DePasquale was undoubtedly motivated by a concern that the defendants receive a fair trial in Seneca County, yet the purpose behind the closure order was unquestionably to prevent such information from reaching the eyes and ears of prospective jurors. In this respect the order constituted a prior restraint on petitioner's freedom to

publish what transpired during the *Huntley* hearing. For this very reason respondent's order violated petitioner's First Amendment rights (see *State ex rel. Dayton Newspapers v Phillips,* 46 Ohio St 2d 457). Judged by the standards enunciated in *Matter of Nebraska Press Assn. Co. v Stuart (supra),* the closure order entered here cannot withstand petitioner's constitutional challenge.

For the reasons stated, the orders of the County Court should be vacated and the petitioner should be granted immediate access to the stenographic transcript of the pretrial *Huntley* hearing.

MOULE, J. P., SIMONS, DILLON and GOLDMAN, JJ., concur.

Application unanimously granted without costs. Orders vacated and matter remitted to Seneca County Court in accordance with *Per Curiam* opinion.

Exclusionary Order of Seneca County Court, Dated November 4, 1976

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DAVID RAY JONES and KYLE EDWIN GREATHOUSE,

Defendants.

Indictment Nos. 76-18 and 76-19

MINUTES OF PROCEEDING held before HON. DANIEL A. DE PASQUALE, Seneca County Court Judge, on the 4th day of November 1976.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney
THOMAS L. JONES, ESQ., as Public Defender for Kyle Edwin Greathouse
STUART O. MILLER, ESQ., as Public Defender for David Ray Jones
DEFENDANTS, Present in person
FREDERICK MOREHOUSE, Deputy County Clerk
KAY L. ROCKWELL, Official Court Reporter

MR. JONES: Before Mr. Ward proceeds, your Honor, I have two motions that I would like to direct to the procedural aspects of this proceeding. Since we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial, on behalf of the defendant Kyle Greathouse I would move that the public and the press be excluded from this hearing.

THE COURT: Mr. Miller?

MR. MILLER: Your Honor, on behalf of David Ray Jones, I make the same motion.

THE COURT: What is your second motion?

MR. JONES: The second motion, your Honor, is that other than the witness testifying at a particular time all witnesses be excluded until after they have completed their testimony.

THE COURT: All right. Now, you understand that the constitutional rights of the defendants—they are entitled to a public and speedy trial and the exclusion of the press and the public, this is being made at your request, and it does abridge the rights, the constitutional rights, of the defendants?

MR. JONES: I fully understand that, your Honor, but this is not a trial, it is a hearing, and I think the dilatorious effects far outweigh the constitutional rights, and I would certainly renew that motion.

THE COURT: And you will renew for the same reasons, Mr. Miller?

MR. MILLER: My motion stands, your Honor. I have discussed this with my client, and that is my motion. I also move to exclude any and all witnesses who are not in fact testifying from the courtroom.

THE COURT: Mr. Jones, you discussed this with your defendant, Mr. Greathouse, is that correct?

MR. JONES: Yes, we have discussed procedural aspects.

THE COURT: All right. The Court is going to grant both your motions, but before I do, Mr. Ward, do you wish to be heard with respect to the motions?

MR. WARD: No, your Honor. I stated earlier that I thought it was up to the defense, and I would not oppose what they wished to do.

THE COURT: Therefore the Court is going to grant the motion, since these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions.

Certification

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

I, KAY L. ROCKWELL, an Official Court Reporter for the Seneca County Court, do hereby certify:

THAT, I attended the proceeding held in the above-entitled matter on the 4th day of November 1976; and

THAT, the foregoing, consisting of pages 2 through 4, is a true, accurate, and complete transcript of a portion of the said proceeding.

Dated: November 17, 1976

/s/ KAY L. ROCKWELL
Kay L. Rockwell

Exclusionary Order of Seneca County Court, Dated November 17, 1976

At a Trial Term of the County Court, Seneca County, held at Waterloo, New York on November 16, 1976.

PRESENT:

HON. DANIEL A. DE PASQUALE,
County Court Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

ORDER

INDICTMENTS 76-18, 76-19

UPON the motion of Gannett Co., Inc., brought by Order to Show Cause and an affidavit in support thereof dated November 8, 1976, to vacate the previous order of this Court which precluded the public and reporters and representatives of Gannett Co., Inc. from attending the suppression hearing held herein pursuant to Article 710 of the Criminal Procedure Law; to admit said individuals to said hearing *nunc pro tunc* as of its commencement; and to grant to Gannett Co., Inc., its reporters and representatives access to the transcript of said hearing immediately upon the completion of said transcript; and

after hearing argument on November 9, 1976 and November 16, 1976 by Nixon, Hargrave, Devans & Doyle, Robert C. Bernius, of counsel, on behalf of Gannett Co., Inc., in support of said motion; and by Thomas Jones, attorney for defendant Greathouse; Stuart Miller, attorney for defendant Jones; and the Seneca County District Attorney, all three of whom appeared specially in opposition thereto; it is hereby:

1. ORDERED, that the motion is in all respects denied; and it is further

2. ORDERED, that the suppression hearing conducted by this Court on November 4-5, 1976 is to be closed to the public for the reasons appearing in the transcript of the oral decision of the Court annexed hereto; and it is further

3. ORDERED, that the application of Gannett Co., Inc. for access to the transcript of said suppression hearing upon the completion of said transcript, is denied, ~~pending completion of the trial herein,~~ for the reasons specified in the transcript of the oral decision annexed hereto and made a part hereof.

Dated: November 17, 1976

ENTER:

/s/ Daniel A. DePasquale

HON. DANIEL A. DE PASQUALE
County Court Judge

/s/ Stuart O. Miller 11/17/76
/s/ Walter J. Ward 11/17/76
/s/ Thomas L. Jones 11/17/76
/s/ Robert C. Bernius 11/17/76

Transcript of Proceedings, Dated November 16, 1976 Incorporated Into Exclusionary Order of November 17, 1976

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

Proceedings held before HON. DANIEL A. DE PASQUALE, Seneca County Court Judge, on the 16th day of November 1976 in the Seneca County Courthouse at Waterloo, New York.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney
THOMAS L. JONES, ESQ., as Public Defender for defendant, Kyle Edwin Greathouse
STUART O. MILLER, ESQ., as Public Defender for defendant, David Ray Jones
ROBERT C. BERNIUS, ESQ., Attorney for Gannett Co., Inc.
KAY L. ROCKWELL, Official Court Reporter

THE COURT: The Court has listened to the arguments and it has filed the memorandum of law which you handed up to the Court, Mr. Bernius. It occurs to this Court that the hearing to which your paper chooses to intervene has already concluded, and the only thing that remains from the hearing is the decision of this Court,

to which you concede, and very readily concede, that that is not to be made available. The decision is not to be made available to the press, to the public, but only to counsel.

It is very unfortunate that you were not here when the motion was made, but the motion was made and it was made with the moving force behind the motion being the rights of the defendants to a fair trial. It was alluded to by counsel that since this was a suppression hearing and certain evidentiary matters may have been testified to, and had they been reported by the press, the defendants would not be able to get a fair trial. The Court in granting the motion—which motion was joined in by the District Attorney or it was without objection from the District Attorney—was granted by the Court on the theory that under the special and unusual circumstances —one of these two defendants being 16 years of age— that there was a reasonable probability of of [*sic*] prejudice to the defendants, and the Court therefore found it necessary to grant the motion.

Now the issue is whether there should be a transcript afforded to the press prior to the decision being rendered. The Court is faced with that decision as to whether a transcript of the proceedings would be made available to the press at this point, or to the Gannett Company, because unfortunately the hearing had been concluded prior to your intervention, and the Court has afforded the Gannett Company a forum to be heard relative to its motion excluding the public and the press.

The Court has had a brief opportunity to study the memorandum of law which you submitted, Mr. Bernius, and point two is a point that the Court finds very much a point that may not be very easily decided, because, "There is inadequate factual basis for exclusion of the public and press." I have not had an opportunity to study the authorities that you cite. Should this burden be placed on the defendants who choose to abridge their

own constitutional rights for the sake of their concern and their rights to a fair trial? I do not believe that there are any authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press.

This is going back to what I stated in the very beginning, that it seemed to this Court that there was a reasonable probability of prejudice to these defendants. Nothing that you said in your oral arguments—I have not examined each and every case which you cited—but there is nothing that you said here, I do not believe, that would change that. This Court still believes that there was a reasonable probability of prejudice to these defendants had the press and the public not been excluded. The Court has afforded the Gannett papers an opportunity to intervene and come in and be heard with respect to the motion which the Court granted. Rather than make a hasty decision—and the Court is inclined—perhaps from remarks that have already been made by the Court, that it has carefully reconsidered the motion which was made on behalf of the defendants, and there is no real moving force for this Court to change its ruling on the motion, taking into consideration, of course, all of the facts and circumstances and everything that has been before this Court including what has happened here this morning. Actually, the urging by the Gannett newspapers for this Court to reverse its decision, there is no real basis for it.

In light of the facts and circumstances of this case, let me say this, that this Court has very sparingly invoked the rule of excluding the public and the press from any hearings and any trials happening in this particular court. There is nothing that has been presented, really, with any basis for changing, or the fact that when the particular motion was made that the Court granted the motion based on the reasonable probability of prejudice to the defendant. However, the Court will study the

memorandum of law and may be arriving at a different conclusion after examining the authorities. I want to give you every benefit of the doubt here, so I will take the time to go over your brief and the authorities that you have cited and go over the authorities that the attorneys for the defense and the District Attorney cited.

If you would like to address yourself to what I have stated, you may, Mr. Bernius, because I do want to make a decision here that is in all fairness. I want to very carefully balance the rights of the public to know and the defendants' rights to a fair trial, and this is actually what this Court is very concerned about.

MR. BERNIUS: Your Honor, the press and the public have the constitutional right to attend this proceeding. There must be a showing, a factual showing, sufficient to overcome that right, which means that the presence of the public and the press, which in some specific manner establish a compelling necessity having a direct adverse impact upon the proceeding of a substantial magnitude [*sic*]. Secondly, there must be a factual showing that there are no alternative means of remedying that problem, and the only thing that has been mentioned today, both by counsel and with all due respect by the Court, is that there is a reasonable probability that the defendants' case would be prejudiced. With all due respect, your Honor, no one has said why the defendants' would be prejudiced by the press. In fact, Mr. Jones has suggested that there is an alternative remedy, which would be a change of venue.

We are laboring in the dark, your Honor, and I would ask your Honor to put on the record why there are no alternative remedies and how the defendants would be prejudiced in order that we could make a determination whether or not we would feel that that would be a sufficient reason for excluding us. In the case of an undercover officer whose life was threatened, fine, but we have nothing at this point, your Honor. There is no order.

THE COURT: There was no trial on the date of the hearing of the matter. It was a suppression hearing, and the hearing had been concluded when you or your newspaper chose to intervene—or just short of its conclusion by a matter of minutes—and now the Gannett papers come in after the hearing is concluded to request a transcript of the proceedings. As counsel stated, after the conclusion of the hearing the only thing left that remains is the decision to be made with respect to the admissibility of the evidence, to which you conceded that there is no right to. So to come in after the conclusion of the hearing to request the defendants to show some factual basis, you cannot put that burden upon a defendant. A motion has to be ruled upon when it is made—then and there at the time that it is made.

The Gannett newspapers knew that the matter was scheduled for a hearing, they did have an opportunity to have counsel present on that particular morning that the motion was made, and unfortunately there was no representative of the Gannett newspapers. There may have been a reporter present in your newspaper who was excluded, but following the conclusion of the hearing—then to say, "Well, let's put the burden on these defendants to show on a factual basis where they are going to be prejudiced," is being unreasonable. You have to go back to when the motion was made, and at the time the motion was made, it was made on behalf of the defendants who were facing very serious charges, and as counsel stated, it was a sensitive hearing. With the age of the defendants and everything being taken into consideration and the fact that the People were joining in, or not objecting to the motion, the Court at that time ruled on the motion, and the basis for its ruling being that there was a reasonable probability of prejudice to the defendants.

The Court is well aware of the constitutional rights of the press and of the public and of the defendants, and it has tried to afford you every opportunity to reconsider its decision in light of the authorities. I think we are faced with a very unique situation here, and a very special set of circumstances that we are faced with. For that reason, there is not anything that you have presented to this Court for it to reverse its decision that was previously made. Again, this brief could have been presented to the Court at some time, perhaps earlier, for its consideration. The Court has had an opportunity to very cursorily examine the memorandum of law, but has noted the authorities cited and the Court has read these cases and is very familiar with them. Very frankly, the Court does not find any reason to reverse its decision that was made at the time the hearing commenced.

MR. BERNIUS: Your Honor, do I take it that you are also denying our application for a transcript?

THE COURT: As I stated in a letter, I think the transcript is all in together with the denial of the motion and the Court not reversing its decision. That is the decision of this Court.

MR. BERNIUS: May I submit an order or should I order a copy of this transcript to serve as the basis for an order in the case concerning our application?

THE COURT: You may submit an order and along with that the record of these proceedings, if you would like.

MR. BERNIUS: Again, there is a delay, and, your Honor, each day that passes is in our estimation an injury to the press. It is now 12:15, and if it is all right with your Honor, perhaps early this afternoon I could submit an order for your signature in lieu of having to wait for a transcript of these proceedings.

THE COURT: I think that should be part of the order. The oral decision from the bench should be part of the order.

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

KYLE EDWIN GREATHOUSE and DAVID RAY JONES,

Defendants.

CERTIFICATION

I, KAY L. ROCKWELL, an Official Court Reporter for the Seneca County Court, do hereby certify:

THAT, I attended the proceeding held in the above-entitled matter on the 16th day of November 1976; and

THAT, the foregoing, consisting of pages 2 through 11, is a true, accurate, and complete transcript of a portion of the said proceeding.

Dated: November 16, 1976

/s/ KAY L. ROCKWELL
Kay L. Rockwell

Order to Show Cause, Dated November 8, 1976

At a Trial Term of the County Court, Seneca County, held at Waterloo, New York on the 8th day of November, 1976.

PRESENT:

Hon. Daniel DePasquale
County Court Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

INDICTMENT NO. 76-18; 76-19

UPON reading and filing the annexed affidavit of Robert C. Bernius, Esq., sworn to the 8th day of November, 1976, and upon motion of Nixon, Hargrave, Devans & Doyle, attorneys for Gannett Co., Inc., it is

ORDERED, that the People of the State of New York and the Defendants herein show cause before this Court at 10:00 a.m. on November 9, 1976, or as soon thereafter as counsel can be heard;

WHY an Order should not be entered herein vacating the previous order of this Court, which precluded the public and reporters and representatives of Gannett Co., Inc. from attending the hearing previously held herein pursuant to Article 710 of the Criminal Procedure Law, *nunc pro tunc* as of November 3, 1976, and granting to

Gannett Co., Inc. and its reporters and representatives access to the transcripts of said hearing immediately upon the completion of said transcript, and such other and further relief as to the Court may seem just and proper.

LET SERVICE of these papers upon the Office of the District Attorney of Seneca County, and upon the office of each of the Defendants herein, be made on or before the 8th day of November, 1976 at 4 p.m.

Dated: November 8, 1976

endorsed

/s/ Daniel A. DePasquale

Hon. Daniel DePasquale
County Court Judge

Seneca County Clerk's Office
FILED AND ENTERED
Nov. 9—1976
Thomas B. Inastin, Jr.
Clerk

Affidavit of Robert C. Bernius in Support of Order to Show Cause

STATE OF NEW YORK COUNTY COURT

COUNTY OF SENECA

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KYLE EDWIN GREATHOUSE and DAVID JONES,

Defendants.

STATE OF NEW YORK
COUNTY OF SENECA SS:
TOWN OF WATERLOO

ROBERT C. BERNIUS, being duly sworn, deposes and says:

1. I am an attorney-at-law, duly admitted to practice in the courts of this state, and associated with Nixon, Hargrave, Devans & Doyle, attorneys for Gannett Co., Inc.

2. I make this affidavit upon information and belief in support of the motion of Gannett Co., Inc. for access to suppression hearings held herein, and for access to stenographic transcripts of said hearings. The sources of my information are conversations with representatives of Gannett Co., Inc. and with the Hon. Daniel DePasquale in open court on November 8, 1976.

3. Gannett Co., Inc. is a public corporation duly incorporated and existing under the laws of the State of

Delaware with its principal offices located in Rochester, New York. It owns and operates *The Democrat & Chronicle,* and *THE TIMES UNION,* general circulation daily newspapers, and Channel 10-T.V., a VHF television station broadcasting in Rochester, New York.

4. Gannett Co., Inc. through its reporters and representatives, has sought to report, and to attend, both on behalf of itself and the public, the pre-trial and trial proceedings herein.

5. Gannett Co., Inc. has a right to attend and to report on said proceedings, guaranteed by the First and Sixth Amendments to the United States Constitution, Article I, §§ 6, 8 of the Constitution of the State of New York, Judiciary Law §4, and Civil Rights Law §12.

6. The order previously issued herein, barring Gannett Co., Inc. from attendance at pre-trial proceedings herein, is violative of the aforementioned rights, and was procedurally defective in a number of ways.

7. Irrevocable harm has been done to Gannett Co., Inc. by its exclusion from the proceedings herein, and said harm will continue until Gannett Co., Inc. is permitted to attend and report on all matters of record.

8. The harm done to Gannett Co., Inc. can be mitigated only by granting to it immediate access to the stenographic transcript of the proceedings from which it has been excluded, together with granting to it permission to attend said proceedings *nunc pro tunc* as of November 5, 1976, and further vacating any prior inconsistent orders herein.

9. No prior application for the relief herein requested has been made.

10. Accordingly, Gannett Co., Inc. respectfully requests that the order previously issued barring Gannett Co., Inc. from reporting on and attending the proceedings herein be vacated, that Gannett Co., Inc. be granted immediate access to transcripts of all proceedings from which it has been excluded, and that Gannett Co., Inc. have such other and further relief as to the Court may seem just and proper.

/s/ ROBERT C. BERNIUS

Sworn to before me this
8th day of November, 1976
/s/ PHYLLIS M. SMITH
Notary Public
[Illegible]

Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 77-1301

Gannett Co., Inc.,

Petitioner,

v.

The Honorable Daniel A. DePasquale,
as Judge of the Seneca County Court,
et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

BRUCE J. ENNIS
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American Civil Liberties Union
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STEVEN R. SHAPIRO
New York Civil Liberties Union
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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization of approximately 250,000 members. The New York Civil Liberties Union is its statewide affiliate. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied within the Bill of Rights.

The present case raises issues of particular interest to the ACLU and NYCLU because it involves an apparent, although we believe misconceived clash between two fundamental civil liberties concerns. On the one hand, the ACLU and NYCLU have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. Likewise, the NYCLU has actively litigated the question of public access to judicial hearings. Matter of Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407 (1972). On the other hand, the ACLU and NYCLU have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity. This historic commitment to both sides of the

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* Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

"free press - fair trial" debate places amici in a unique position to aid the Court in balancing these critical constitutional values.

QUESTION PRESENTED

Did the Court of Appeals correctly hold that a trial judge in a criminal trial of considerable local interest could constitutionally exclude the public from a pretrial suppression hearing without a particularized showing of likely and substantial prejudice to the defendants, without a finding that other methods of preventing prejudice would have been ineffective, and with the burden on the excluded members of the press to show a "genuine public interest . . . outweigh[ing] the risks of premature disclosure"?

STATEMENT OF THE CASE AND POSITION OF AMICI

On July 19, 1976, Wayne Clapp, a former policeman in a small upstate New York community near Rochester, was reported missing by the local news media after his bullet-ridden boat was discovered adrift in Seneca Lake. An unsuccessful search to uncover his body was promptly begun. Three days later, two youths, ages 16 and 21, were arrested in Michigan and charged with the crime. At the time of the arrest, front page articles reported that each of the defendants had made

incriminating statements and that one of the defendants had led the police to the spot where he had buried Clapp's stolen revolver.

On November 4, 1976, a hearing was held on defendants' motion to suppress both their confession and the physical evidence discovered in Michigan. At the start of the hearing, defense counsel moved to exclude the public and the press, claiming only that evidentiary matters would be revealed "which may or may not be brought forth subsequently at trial." That request was orally granted by the trial judge without requiring the defendants to demonstrate the likelihood of prejudice if the hearing were open and without exploring the possibility that one of the procedural devices suggested in Sheppard v. Maxwell, 384 U.S. 333, 361-362 (1966), might be adequate to protect defendants' fair trial rights. On appeal, this lower court order was upheld by a divided New York Court of Appeals which ruled that whenever a criminal case has aroused some public interest, pretrial hearings should presumptively be closed at the defendant's request unless the members of the press or the public seeking access to the proceedings can show that "the magnitude of any genuine public interest . . . outweigh[s] the risks or premature disclosure." p. 9.

Amici respectfully suggest that this presumption in favor of closed judicial hearings is flatly inconsistent with our entire constitutional tradition. As this Court has observed on numerous occasions, the press and the public have a right to

observe the judicial process at work. The decision to close the doors of the courthouse is an extraordinary step which can only be justified if no other alternatives exist. In short, it is a last resort, not a first option. The failure of the Court of Appeals to appreciate that fact requires review by this court.

REASONS FOR GRANTING THE WRIT

I. This case presents an unresolved issue of great importance in the administration of criminal justice throughout the country involving the accommodation of conflicting interests of constitutional magnitude.

Two Terms ago, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court held that an extraordinary justification was required to sustain an order restraining the press from publishing information concerning a criminal proceeding. The Court expressly left open the question under what circumstances a trial court may constitutionally close criminal proceedings to the public in order to prevent the press and the public from obtaining information potentially prejudicial to a criminal defendant. Id. at 564 n. 8; cf. id. at 576 n. 3, 584 n. 11 (Brennan, J., concurring in judgment). This case presents precisely that question. Like the issue decided in Nebraska Press, it is a question of great significance both because of the magnitude of the constitional interests involved and because of its

practical importance in the day-to-day administration of criminal law.

A. The question presented involves the accommodation of significant constitutional interests.

This case presents a familiar conflict of values in a form not previously faced by this Court. On the one hand, the defendant's right to a fair trial before an unprejudiced jury, guaranteed by the Sixth Amendment and by the due process clauses of the Fifth and Fourteenth Amendments, can be compromised by excessive and inflammatory pretrial publicity. See e.g. Irwin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965). On the other hand, the public has a right, inherent both in the First Amendment's guarantee of freedom of the press and the Sixth Amendment's command of public trials, to receive information concerning the operation of the criminal justice system.

In accommodating these rights, each of paramount importance, this Court has insisted time and again that the defendant's right to a fair trial must be assured by means that do not impermissibly impinge upon First Amendment values. Thus, this Court has repeatedly rejected use of the contempt power to punish those whose public statements arguably threaten the integrity of judicial proceedings. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). And no

opinion of this Court has yet sustained a prior restraint intended to preclude discussion of the judicial process. Nebraska Press Association, supra; Oklahoma Publishing Co. v. District Court, 430 U.S. ___, 97 S.Ct. 430 (1977).

The present case is distinguishable from those earlier decisions only in that here the New York courts have not sought to prevent the press from printing information already in its possession, or from reporting what transpires in open court. Rather, they have sought to prevent the public and the press from acquiring information in the first instance, by closing the court. At first glance, such an action may appear as less of an affront to First Amendment interests than a direct "gag order" that in terms inhibits speech. In fact, such an order is far more sweeping, since it prevents any member of the public or press from observing the functioning of the judicial process, and thereby thwarts the public's right to information about the courts even more drastically and completely. Clearly, such orders frustrate "the function of the press . . . to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975). As the dissenting judges below pointed out, quoting the staff report of a Senate subcommittee, a closed hearing represents "a serious backdoor threat to First Amendment interests." Dissent, p. 4. Moreover, by excluding members of the public generally, such orders conflict with the Sixth Amendment's command that trials

be public.

Without doubt, therefore, the propriety of the trial court's order in this case closing pretrial suppression hearings presents an important problem for resolution by this Court. And like other cases involving the "free press - fair trial" problem, this cases requires great sensitivity to the various constitutional interests at stake. We agree, however, with Mr. Justice Brennan, that "a choice [between First Amendment freedoms and the rights of a defendant to an impartial jury] is [not] necessary, that there is[no]inherent conflict that cannot be resolved without essentially abrogating one right or the other," Nebraska Press, supra, 427 U.S. at 611-612 (concurring opinion). The importance of reconciling those constitutional commands requires review by this Court

B. The question presented is one of increasing practical importance in the administration of criminal justice.

The significance of the constitutional issues involved in this case would alone, in our view, justify plenary review by this Court, even if the problem were one that arose infrequently. That is not, however, the situation here. On the contrary, the closing of court proceedings in criminal cases of great interest to the public is an increasingly common occurrence. Since this Court indicated in Nebraska Press that orders restraining the press from publishing information obtained in open court proceedings would rarely be consistent with the First Amendment, trial courts around the country

have with increasing frequency sought to achieve the same result by denying the press access to such information by holding judicial proceedings in secret. See Commercial Printing v. Lee, 2 Med.L.Rptr. 2352 (Ark.Sup.Ct. 1977); State ex rel. Dayton Newspapers, Inc. v. Phillips, 351 N.E.2d 127 (Ohio Sup.Ct. 1976); cf. United States v. Gurney, 3 Med.L.Rptr.1081 (5th Cir. 1977); Northwest Publications v. Anderson, 3 Med.L.Rptr. 1302 (Minn.Sup.Ct. 1977).

Given the constitutional command that judicial proceedings in criminal cases be conducted in public, closing the courts to the people must be regarded as an extraordinary remedy, to be reserved for extraordinary circumstances. The frequency with which the courts have recently resorted to this practice suggests that courts have been too quick to adopt a solution that may suit the convenience of the parties before them more than the requirements of the Constitution. The standard applied by the Court of Appeals in this case illustrates the failure of the lower courts to realize the radical nature of such orders. This case presents an opportunity for this Court to give guidance to the lower courts on the standards to be applied in deciding whether to invoke such a procedure.

II. The decision below, by permitting criminal proceedings to be closed without an adequate showing of necessity, unconstitutionally infringes the public's right to information about the criminal process.

The order approved by the New York Court of Appeals excluded the public from a pretrial suppression hearing in a murder case of grave public concern. It did so simply upon the request of the defendants, without any consideration of the adequacy of alternative means for insuring a fair trial. In the view of the Court of Appeals, the only limitation on the discretion of trial courts to enter such orders is the provision of an opportunity for "interested members of the news media . . . to be heard . . . in a preliminary proceeding adequate to determine the magnitude of any genuine public interest [that] may be found to outweigh the risks of premature disclosure." p. 9. We believe that the standard applied by the Court of Appeals gives far too little weight to the constitutional interest of the public in information regarding the criminal justice system.

A. The nature of the constitutional interest involved.

The right of the press and the public to information about the functioning of the criminal courts is a basic constitutional right, protected by the First and Sixth Amendments, and essential to the proper working of a democratic government. As this Court has frequently recognized: "A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. at 374.

When a court seeks to close judicial proceedings to members of the press, it interferes with the right of the press "to

report whatever occurs in open court through their respective media," Estes v. Texas, supra, 381 U.S. at 541, every bit as effectively, and with every bit as much danger of suppressing "the beneficial effects of public scrutiny upon the administration of justice," Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491, as if it had sought to enjoin the press from printing information already in its possession.*

The First Amendment interest at stake in this case is therefore precisely the same as in Nebraska Press. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government," Cox Broadcasting v. Cohn, supra, 420 U.S. at 491.

We recognize this Court's ruling in Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972), "that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." But it does not follow from Branzburg that the First Amendment interest involved in this case is so insignificant that it can be ignored. It is one thing to hold that the press can be excluded from grand jury proceedings. It is

* As the dissenting judges below observed, it is somewhat artificial to assume "that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it." Dissent, p.4.

quite another thing to say that First Amendment rights are not affected by governmental decisions to conduct business in secret.

At any rate, we do not advance a claim of special priviliege for members of the press to have access to places or events from which the general public is legitimately exluded. Rather, we maintain that the order of the New York court in this case infringed a right of the public in general to scrutinize the judicial process.* This right derives not only from the "First Amendment right to 'receive information and ideas,'" Kleindeinst v. Mandel, 408 U.S. 753, 762 (1967); see also, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1965); Lamont v. Postmaster General, 381 U.S. 301 (1965); Thomas v. Collins, 323 U.S. 516 (1945), but also from the command of the Sixth Amendment that criminal trials be public.

The Sixth Amendment guarantee of a public trial in criminal cases is a fundamental principle of liberty. What this Court has called "[t]he traditional Anglo-American distrust for secret trials," In re Oliver,

* Of course, in most circumstances, it would be members of the press who would most actively seek enforcement of this right. As this Court has noted, "in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491.

333 U.S. 257, 268 (1948), is a long-standing aspect of our criminal justice system: its roots extend to the abolition of the Court of Star Chamber in 1641. Id. at 266. The importance of public scrutiny "as a safeguard against any attempt to employ our courts as instruments of persecution" has long been recognized. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Id. at 270.

Of course, the right to a public trial is primarily a protection of the defendant. The text of the Sixth Amendment states that "the accused shall enjoy" that right, and insofar as the purpose of the guarantee is to prevent the use of the courts to persecute dissident minorities, the defendant can be counted upon to invoke the Amendment's protection. Nonetheless, the unanimous weight of authority, as the Court of Appeals recognized in this case, supports a broader view of the Amendment's command. See e.g. Matter of Oliver v. Postel, supra; United States v. Columbia Broadcasting System, 497 F.2d 102 (5th Cir. 1974).

Quite clearly, interests other than those of the defendant are protected by the requirement of public trials. These include: education of the public about the nature of the judicial process, In re Oliver, supra, 333 U.S. at 270 n. 24; preservation of public trust in the fairness of the courts, United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); the possibility that witnesses might learn of the trial and come forward

to testify, In re Oliver, supra, 333 U.S. at 270 n. 24; and the right of the public to scrutinize the judicial process and to form its own conclusions about political issues affecting the judiciary.

Moreover, issues might arise in a trial, or in a pretrial suppression hearing, that would be of significant public interest but that the defendant, the prosecutor, and the court might each for their own purposes be content not to see revealed. In a case like this one, for example, the public has an important interest in observing the functioning of the exclusionary rule, both to evaluate the merits of proposals that the legislature alter the nature of that remedy, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971)(Burger, C.J., dissenting), and to inform itself about possible government violations of constitutional norms. Yet the defendant's interest in preventing public knowledge of possible incriminating evidence, and the prosecutor's interest in suppressing knowledge of government misconduct, can prevent public awareness of these facts unless the public has an independent right to observe the criminal process.

We agree with the Court of Appeals that the need to protect a defendant's right to a fair trial before an impartial jury uncontaminated by prejudicial pretrial publicity is at least as important as the other interests that have been held to justify exclusion of the public from the criminal proceedings in appropriate circumstances. See e.g. United States ex rel. Smallwood

v. LaValle, 377 F.Supp. 1148 (E.D.N.Y.), aff'd, 508 F.2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975)(trial closed to protect the safety of witnesses); United States v. Clark, 498 F.2d 535 (2d Cir. 1974) (hearing closed to maintain the integrity of government precautions to forestall hijackings). The New York courts in this case, however, applied an impermissibly lenient standard, permitting the vital constitutional rights of the press and public under the First and Sixth Amendments to be infringed when no real threat to the defendants' right to a fair trial existed that could not be dealt with by means not involving constitutionally protected interests.

B. The Court of Appeals failed to give adequate recognition to the public's rights, and to the existence of less restrictive alternatives.

Given the nature of the public's constitutional right to observe the operation of the criminal courts, the exclusion of the public from criminal proceedings is not a step to be taken lightly. Before a court undertakes to exclude the public because of the possible prejudicial impact of material that may be the subject of suppression hearings, it must assure itself that an actual danger of such prejudice exists, and that it cannot be averted by less drastic means. Cf. Nebraska Press, supra. The New York courts completely failed to do so in this case, and the opinion of the Court of Appeals, by setting a standard that encourages trial courts to close suppression

hearings almost as a matter of course, assures that they will continue to do so in the future.

The trial judge in this case initially closed the suppression hearing to the public simply at the request of the defendants, finding only that "certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants." When petitioner appeared by counsel and moved the court to vacate the order, the judge found "a reasonable probability of prejudice to the defendants" and stood by his earlier order. No specific findings were made concerning the extent of the likely publicity for whatever information was expected to be revealed, the likelihood that such publicity would reach and prejudice potential jurors, or, most significantly, the possibility that the devices suggested by this Court in Sheppard v. Maxwell, supra, would adequately protect the defendants' interests.*

The opinion of the Court of Appeals is even more cavalier in its disregard of the public's right to information about the operation of the courts. Strongly implying that the trial court has an obligation not "to allow public disclosure of potentially tainted evidence," p. 8, that court held that

* The Court of Appeals' comment that the county court had "determin[ed] that open suppression hearings, if exposed to notoriety, would have deprived [the defendants] of any meaningful opportunity to receive a fair trial" represents, even in its conditional form, a considerable overstatement of the trial court's actual findings.

"where press commentary on pretrial suppression hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." p. 9. This presumption may be overcome only if "the magnitude of any genuine public interest [is] found to outweigh the risks of premature disclosure." Id.

The Court of Appeals opinion completely reverses the appropriate presumptions. The standards it announces are fatally defective in a least two ways. First, the court entirely fails to allow for the possibility that alternate means for protecting the defendant's rights might be found. In particular, the court appears to rule out the possibility of a change of venue. Yet the facts of this very case demonstrate the possibility that a change of venue can accommodate the public's right to know and the defendant's right to a fair trial. Indeed, the case would appear a classic one for a change of venue: because of the local fame of the victim, the case was rather notorious in the immediate vicinity but caused hardly a ripple of interest in other parts of the State.* Even in Sheppard v. Maxwell, supra, where this Court was faced with a barrage of pretrial publicity far in excess of anything shown here, Justice Clark observed:

* As far as amici have been able to determine, neither Mr. Clapp's disappearance nor defendants' subsequent arrest were even reported in the New York Times. A change of venue to New York City would, therefore, have clearly protected defendants' fair trial rights.

> "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Id. at 363-364.

Second, by insisting that pretrial hearings be opened only upon a showing of extraordinary interest in a particular case, the Court of Appeals ignores the fact that the public has an interest of consitutional dimension in the functioning of the judicial process in each and every case.

As we have pointed out, we do not seek a rule that pretrial suppression hearings always be opened to public scrutiny, regardless of the interest of the state or the defendant. Indeed, we agree with this Court's dictum in Branzburg v. Hayes, supra, that the defendant's interest in a fair trial uncontaminated by prejudicial publicity may be significant enough in particularly appropriate circumstances, to outweigh the public's constitutional right to information about the judicial process and to require the closing of such hearings. Nevertheless, the right of the public is not to be disregarded. The actions of the New York courts in this case demonstrate the need for this Court to set appropriate standards for determining the existence of the necessary circumstances.

The standards that best protect the public's right without endangering the defendant's rights are analogous to this this Court announced in Nebraska Press.

First of all, we believe it is essential to emphasize, as the Court of Appeals did not, that the right of the public to access to the courts is of constitutional dimension, and not to be interfered with lightly. Therefore, in the ordinary case, it is to be presumed that all significant aspects of a criminal trial shall be conducted in the open.

Second, in order to depart from this ordinary practice, the trial court must find a significant likelihood that, because of the notoriety of the case and the prejudicial nature of the evidence likely to be offered at a suppression hearing, an open hearing could impinge upon the defendant's right to a fair trial. It should be noted that the wide dissemination of even highly prejudicial material will not always interfere with a defendant's rights. See e.g. Murphy v. Florida, 421 U.S. 794 (1975).

Third, and it is here that the standards set by the Court of Appeals are most deficient, the court must inquire "whether measures short of an order [closing the hearing to the public] would have insured the defendant a fair trial." Nebraska Press, supra, 427 U.S. at 563. In this case, for example, it seems clear that a change of venue would have been sufficient to preserve the defendants' rights. In other cases, a continuance to allow the case to fade from public memory, or a careful voir dire at the time of jury selection, have proved

equally effective.* See Nebraska Press, supra, 427 U.S. at 563-564; Sheppard v. Maxwell, supra, 384 U.S. at 357-362; United States v. Silverthorne, 400 F.2d 627, 635-640 (9th Cir. 1968).

Finally, the court must consider whether or not an order closing the pretrial hearing would effectively prevent impairment of the defendant's rights. Cf. Nebraska Press, supra, 427 U.S. at 565-567. If, for example, the substance of the evidence to be introduced at the suppression hearing has already been made public, little purpose would be served by shielding the judicial response to that evidence from public scrutiny. Again, it would appear from the record in this case, that by the time of the suppression hearing the press had already reported defendants' confession and the fact that the police had been led to the victim's missing gun.

The failure of the Court of Appeals to adhere to the standards announced in Nebraska Press is a serious matter which this Court cannot ignore and should not condone. Under the proposed rule of the Court of Appeals, pretrial hearings in virtually any criminal case that attracts widespread publicity can be closed to the public, and the primary avenue through which the public can observe the costs and benefits of the exclusionary

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* The availability of these alternate remedies negates any argument that closure is necessary to effectuate the purposes of the exclusionary rule. Incompetent and prejudicial evidence can be kept from the jury without any sacrifice of First Amendment rights through the simple device of a change of venue in those few cases where pretrial publicity is a serious problem.

rule, and learn of the conduct of their public officials that often requires the exclusion of evidence, will be needlessly lost.* As we stated at the outset, pretrial proceedings should only be closed as a last resort in that rare criminal case where the defendant's right to a fair trial is genuinely and demonstrably threatened, and cannot be otherwise assured. If this simple rule is followed, then the rights of the defendant as well as those of the public will be fully guaranteed.

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* It is not a sufficient answer that suppression hearings in cases in which the public is not interested will remain open, or that under the Court of Appeals' opinion transcripts of the hearings will be available even in notorious cases after the trial is over. The beneficial effects of public scrutiny cannot be obtained if such scrutiny is allowed only in cases, or at times, in which a lack of interest indicates that little scrutiny will occur. This Court has in the past been particularly careful in reviewing restraints on the public's right to receive information that "produce their restrictive results at the precise time when public interest in the matter discussed would naturally be at its height." Bridges v. California, supra, 314 U.S. at 268.

CONCLUSION

For the reasons stated above, certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1301

GANNETT CO., INC., *Petitioner*

v.

THE HONORABLE DANIEL A. DEPASQUALE, AS JUDGE OF THE SENECA COUNTY COURT, ET AL., *Respondents*

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association and Reporters Committee for Freedom of the Press submit this brief amici curiae in support of Petitioner Gannett Co., Inc. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation or-

ganized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1285 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. Twenty daily or weekly newspapers owned by Gannett Co., Inc., as well as forty-five other newspapers published throughout the State of New York, hold membership in ANPA. Concerned with the issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and provide meaningful input on, specific matters relating to these concerns.

The Reporters Committee for Freedom of the Press is a legal research and defense fund of working reporters and news editors primarily dedicated to defending the First Amendment and freedom of information interests of the press to report on and the public to receive news.

The Committee and ANPA enter this case as amici curiae in support of the Petitioner because they strongly agree with the dissenting opinion of the New York Court of Appeals that the majority opinion will signal the routine establishment of secret pretrial proceedings in the State of New York in violation of First and Sixth Amendment rights of the public and the press.

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Your amici adopt the questions presented, constitutional provisions involved and statement of the case, as set forth in the Petition of Gannett Co., Inc.

NO PART OF A CRIMINAL PROCEEDING MAY BE CLOSED TO THE PUBLIC AND PRESS IN THE ABSENCE OF A SUBSTANTIAL AND SPECIFIC FACTUAL SHOWING THAT REVELATION OF THE MATTERS ADDUCED AT SUCH A PROCEEDING WILL POSE A CLEAR AND PRESENT DANGER TO THE ADMINISTRATION OF JUSTICE

The motions for closure made by the defendant, and joined in by the prosecution, at the *Huntley* hearing below were completely unsupported by any showing that a failure to close the proceedings posed a "serious and imminent threat of interference with a fair trial" or "would create a clear and present danger of influencing the jury verdict." Nevertheless, Judge DePasquale granted the motions since "matter [might] come up . . . that [might] be prejudicial to the defendant . . . ." Petition at 31a. This ruling was in blatant disregard of the First Amendment interests necessarily affected by the closure order. This initial error, egregious as it was, has now been compounded in the decision of the New York Court of Appeals.

In its opinion, the New York Court of Appeals, while paying lip service to the First Amendment values at stake, held that a trial or hearing judge—"[a]s the locus of public interest"—has absolute discretion to close his courtroom to the public and the press, and this discretion may be exercised in the absence of any showing whatsoever that public revelation of the anticipated testimony or evidence poses a clear and present danger to the administration of justice. Ignoring one of the most basic principles of law—*i.e.* that the rulings of a trial or hearing judge must be based only on the evidence properly presented to the court—the New York Court of Appeals has held that a hearing judge, having been presented with

no evidence as to the potentially prejudicial effect of the public release of information, may, nevertheless, take into consideration his own knowledge, however derived, of the extent of past publicity and base his ruling thereon. Even more incredible, the hearing judge is invested with authority "to distinguish mere curiosity from legitimate public interest" and, whenever he determines that the public's interest results from anything less than an "overwhelming" legitimate public interest, close the proceedings to the public and the press. Petition at 11a. Such a perversion of judicial process, coupled with the total disregard of First Amendment guarantees, is clearly contrary to law and the decisions of this Court.

While the New York Court of Appeals made some reference to the guarantees of the First Amendment and this Court's decisions concerning those guarantees, that court's opinion, ultimately, must be construed as a declaration that First Amendment values and interests are not implicated, nor worthy of consideration, in a hearing judge's decision to close a pretrial criminal proceeding:

> "Of primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial. This concept is premised on the right to an impartial jury as the arbiter of guilt or innocence." Petition at 10a-11a.

It is clear, however, that First Amendment values are at issue in a court's decision to close pretrial criminal proceedings, and that the Sixth Amendment, rather than mandating closure, demands the "openess" required by the First Amendment. *United States* v. *Cianfrani,* (3d Cir., 1978, Nos. 77-2245 and 77-2462,

decided Mar. 16, 1978), Slip Opinion at 18 (Sixth Amendment requires that pretrial criminal procedings be open to the public); *accord, Bennett* v. *Rundle,* 419 F.2d 599, 606 (3rd Cir. 1969); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) (press, under First Amendment, has responsibility to report proceedings of the courts).

Although the trial court, in the instant case, concluded in its oral ruling that "these matters are in the nature of a *Huntley* hearing and . . . not the trial," what transpires in a *Huntley* hearing is clearly of legitimate public interest, and the public's right to obtain information in regard thereto may not be infringed, absent a showing by the Respondent of some compelling and overriding state necessity. *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 561, 590-591, 593 (1976); *Schenck* v. *United States,* 249 U.S. 47, 52 (1919); cf., *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).

Where that compelling and overriding state necessity is the avoidance of pretrial publicity, purportedly prejudicial to a defendant's Sixth and Fourteenth Amendment right to a fair trial, the attendance of the press at a *Huntley* hearing and the publicity which presumably will result therefrom "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney,* 331 U.S. 367, 376 (1947). See also *CBS Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975); *U.S.* v. *CBS Inc.* 497 F.2d 102 (5th Cir. 1974). Yet, in justification of its order permitting secret judicial proceedings, the trial court below merely adverted to the fact

that "[c]ertain evidentiary matters may come up in the testimony of people's witnesses that may be prejudicial to the defendants . . . ." Petition at 4a. Obviously the substantial restraint imposed upon press freedoms by permitting secret judicial proceedings cannot be based upon such supposition and conjecture.[1] See. *N.Y. Times Co.* v. *U.S.*, 403 U.S. 713, at 725-726 (1971) (Brennan, J., concurring opinion). There must be a substantial and specific factual showing by the movant that revelation of the anticipated testimony or evidence *will* threaten the fair administration of justice, and the burden of making such a showing is clearly on the movant.

In *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976), Justice Powell emphasized "the unique burden that rests upon the party, whether it be the State or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity." 427 U.S. at 571 (Powell, J. concurring). Chief Justice Burger stated that this Court, when reviewing orders concerning pretrial publicity, "must examine the evidence before the trial judge when the order was entered . . . ," 427 U.S. at 562, and must assess "the

[1] A similarly conjectural justification for secret judicial proceedings was offered by New York State Court of Appeals:

> "Knowing how damaging the introduction of this evidence *could be* to a defendant, and the widespread knowledge even of inadmissable evidence *could* nonetheless predetermine guilt (e.g., *Sheppard* v. *Maxwell, supra*), we require the trial judge to ensure that tainted evidence never see the light of day."
>
> • • •
>
> "To allow public disclosure of *potentially* tainted evidence . . . is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced." Petition at 8a, 10a.

adequacy of the showing made . . . ." 427 U.S. at 569. In *Nebraska Press,* considerable evidence was presented to the trial judge (427 U.S. at 562), and the Nebraska Supreme Court had a full evidentiary record on which to base its review (427 U.S. at 583 n.10). In the instant case, there was no evidence presented to the hearing judge and no evidentiary record which the New York Court of Appeals could review.

In considering challenges to criminal convictions wherein the defendant has maintained that pretrial publicity prejudiced the jury, this Court has repeatedly held:

> ". . . it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

United States ex rel. Darcy v. *Handy,* 351 U.S. 454, 462 (1956); see also, *Beck* v. *Washington,* 369 U.S. 541, 558 (1962).

While your amici believe that judicious use of the alternative means (*i.e.,* means other than restrictions on the press) discussed in *Nebraska Press* and *Sheppard* v. *Maxwell,* 384 U.S. 333 (1964), will be sufficient to protect against potential prejudicial effects on a jury or venire, it is submitted that, if a pretrial hearing or trial may be closed to the public and press, such a closing may be ordered only if: 1) there has been a substantial and specific factual showing that release of information will pose a "serious and imminent threat of interference with a fair trial," *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242

(7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); 2) the threatened interference has been demonstrated with "the requisite degree of certainty to justify restraint," *Nebraska Press* at 569-70; and 3) the threatened prejudicial effect of such information on potential jurors cannot be avoided by alternative means. See, ABA Adjunct Committee on Fair Trial/ Free Press, *Standards Relating to Fair Trial and Free Press* § 3.2 (Approved Draft, February, 1978).

In the instant case there was no factual showing of any kind, there was no demonstration of the certainty of the threatened interference, and there was no consideration of whether the use of alternative means might avoid any potential prejudice. The New York Court of Appeals failed to address any of these factors as they applied to the closure order issued by Judge DePasquale. Rather, that court, although starting with the premise that "[c]riminal trials are presumptively open to the public," Petition at 5a, concluded with the premise that pretrial evidentiary hearings are presumptively to be closed to the public unless the public has an overwhelming interest in keeping the proceedings open. Petition at 10a-11a. In so concluding, that court has rendered the First Amendment a second class right subservient to the asserted guarantees of the Sixth Amendment in this case.

This Court has flatly refused to assign priority as among the competing interests of the First and Sixth Amendments:

> "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . it is not for us to rewrite the Constitution by undertaking what they declined to do."

Nebraska Press Association v. *Stuart,* 427 U.S. at 561. If the decision of the New York Court of Appeals is permitted to stand, the resultant effects will be devastating to the freedom of the press and the public's right to be informed.

UNDER THE DECISIONAL AUTHORITIES OF THIS COURT, THE HOLDING OF THE NEW YORK COURT OF APPEALS IS VIOLATIVE OF THE FIRST AND SIXTH AMENDMENTS BY SHIFTING TO THE PRESS AND PUBLIC THE BURDEN OF PERSUASION WITH RESPECT TO THEIR RIGHT TO ATTEND "PRESUMPTIVELY OPEN" JUDICIAL PROCEEDINGS.

The opinion of the New York State Court of Appeals below is clearly erroneous and should be reversed. It approves the closure of a preliminary hearing under factual circumstances which are patently insufficient under the standards set forth by this Court in *Nebraska Press Ass'n* v. *Stuart, supra.* Moreover, the opinion establishes a judicial approach to the issue of closing proceedings in New York State which subverts the venerable principle of constitutional law that governmental activity in derogation of First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest." *Kusper* v. *Pontikes,* 414 U.S. 51, 58 (1973). In order to justify state infringement of First Amendment freedoms, "[t]he [state] interest advanced must be paramount, one of vital importance, *and the burden is on the government to show the existence of such an interest." Elrod* v. *Burns,* 427 U.S. 347, 362 (1976) (emphasis added).

The New York State Court of Appeals has sought to legitimize its lesser showing of cause for the instant closure order by distinguishing this case from that presented to this Court in *Nebraska Press Association* v. *Stuart, supra.* It differentiates between a "gag order" prohibiting dissemination of information gleaned in open court and an order which closes pretrial proceedings, thereby cutting off press access to the information in the first place. Respondent and the New York Court of Appeals therefore assert that a lesser infringement of First Amendment values is involved in the instant case. Yet it is clear, from the standpoint of the press, that although closure of proceedings may be characterized as an "indirect restraint," it achieves the same result as a gag order and in effect constitutes a prior restraint on newsgathering and, *ipso facto,* news dissemination by the press. As cogently expressed by the New Jersey Supreme Court:

> "The fact that the United States Supreme Court has chosen to emphasize that press 'gags' were imposed on reporting events which transpired in open court . . . should not be used as a justification for closing court proceedings to the press and the public. It must be realized that the use of closed proceedings has the capacity to subvert the entire effect of [decisions barring impositions of prior restraints—in form of gag orders—upon the press]." *New Jersey* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977).

For to permit a trial court to conduct a *Huntley* hearing *in camera,* merely upon the fear and supposition that not to do so, "would threaten the impaneling of a constitutionally impartial jury in the county of

venue", is to eviscerate the protections for the press recognized by this court in *Nebraska Press Association* v. *Stuart, supra,* and *Oklahoma Pub. Co.* v. *District Court of Oklahoma County,* —— U.S. ——, 97 S.Ct. 1045 (1977).

Moreover, implicated in an order to close judicial proceedings are important societal interests which are derived not only from the First Amendment right to gather and disseminate news, but from the public trial requirement of the common law and Sixth Amendment as well. See, *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978) (Slip Opinion at 14-24). The protections against police and judicial misconduct, perjury and the appearance of injustice accorded by the public trial requirement under common law and the Sixth Amendment "are often separate from—and in some cases [admittedly] antagonistic to—the interests of a defendant in a particular criminal case." *Id.,* at 27. Yet this court has recognized that these protections are "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975).

Consequently,

> "any motion that seeks to close any portion of a proceeding subject to the public trial requirement of the sixth amendment, or to seal any portion of the record thereof, may be granted only after full and fair consideration by the court of the important public policies that the sixth amendment protects." *United States* v. *Cianfrani, supra,* at 30.

Thus, "any claim of practical justification for a departure from the constitutional requirement of a

public trial must be tested by a standard of strict and inescapable necessity," *Bennett* v. *Rundle,* 419 F.2d 599, 607 (3rd Cir. 1969) (en banc), and "any order of exclusion must extend no farther than the circumstances strictly warrant in order to meet the asserted justification for closure." *U.S.* v. *Cianfrani,* supra, at 30.

Nevertheless, although "the decisions reached in most suppression hearings do not turn upon [or necessarily require disclosure of] the contents of the communication at issue," *id.,* at 39, Respondent excluded the public from the entire proceeding and sealed the resultant record. This error was compounded by the New York Court of Appeals when it approved this "remedy" on the grounds that Respondent was "not presiding over a trial on the merits," and the societal interest in the public trial requirement is "somewhat attenuated in comparison with defendants' self-interest." (Petition 8a, 6a). The decision of the New York Court of Appeals clearly fails to consider adequately "the important public policies that the sixth amendment protects", id., at 30, and to limit the destructive impact on those policies resulting from Respondent's closure order.

The New York State Court of Appeals decision is also defective in that it erroneously assigns to the trial court, in ruling on motions for the closure of proceedings, the function of "distinguish[ing] mere curiosity from legitimate public interest." Petition at 11a. Your amici respectfully submit that the degree of the public's prior interest or disinterest in a particular proceeding cannot be a determining factor dictating the closure of "presumptively open" court proceedings. The trial court may

not "involve [itself] in an ad hoc evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime." *Nebraska Press Association, supra,* at 605 (Brennan, J., concurring opinion). For regardless of the dignity, gravity, or propriety of the public's interest in a particular criminal proceeding, important benefits may result from press coverage of events leading up to and surrounding a criminal trial. See, *Nebraska Press Association, supra,* at 605-606 (Brennan, J., concurring opinion); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469,491 (1975); *In Re Oliver,* 333 U.S. 257, 266, 270 (1948); *United States* v. *Clark,* 475 F.2d 240, 247 (2d Cir. 1973).[2]

> "[T]he press does not simply publish information about trials [to satisfy public curiosity] but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U.S. at 349-350 (1966).

In recognition of this fact, various courts have determined that the guarantee of a public trial is not solely a right of the accused; nor is it a right which may be waived by agreement between the accused

[2] "To exempt pretrial suppression hearings . . . from the public trial provision thus raises the possibility that critical proceedings will be insulated from public view without a showing sufficient to overcome the sixth amendment's requirements. When decisions crucial to the outcome of the entire criminal case are made at such proceedings, all of the policies outlined above in support of the open trial requirement apply with full force, the need to make the trial accessible to unknown parties who might have important knowledge to bring to light, the need to subject the judiciary to public scrutiny in the performance of its duties, and the need to provide the 'appearance of justice' in order to foster confidence in the judicial system." *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978) (Slip Opinion at 22).

and the prosecutor who may be fearful that pretrial publicity will result in reversal of a conviction on appeal. Although under certain circumstances, a defendant may waive his constitutional right to a public trial, he has no absolute right to compel a private trial. See, *Singer* v. *United States,* 380 U.S. 24, 34-35 (1965); *United States* v. *Cianfrani,* Crim. No. 77-142 (3rd Cir. 1978); *United States* v. *American Radiator & Standard San. Corp.* 274 F.Supp. 790, 794 (W.D. Pa.), aff'd 388 F.2d 201 (3rd Cir. 1967), cert. den., 390 U.S. 922 (1968); *United States* v. *Kobli,* 172 F.2d 919, 924 (3rd Cir. 1949); *E.W. Scripps Co.* v. *Fulton,* 100 Ohio App. 157, 60 Ohio Ops. 147, 125 N.E.2d 896, app. dism'd, 164 Ohio St. 261, 130 N.E.2d 701 (1955). See contra, *United Press Association* v. *Valente,* 308 N.Y. 71, 123 N.E. 2d 777 (1954).

"There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to supress, edit, or censor events which transpire * * * before it," *Craig* v. *Harney,* 331 U.S. 367, 374 (1947); and a waiver by the defendant is no substitution for a finding by the court that there exists a clear and present danger to the conduct of a fair trial and that alternative, less drastic means of preserving a fair trial are unavailing.

The N.Y. State Court of Appeals has reversed the constitutionally-mandated burden of persuasion in respect of obtaining closure of pretrial proceedings. Under its holding, when faced with a defendant's attempted waiver of his Sixth Amendment right to a public trial and undocumented speculation as to the adverse impact of pretrial publicity, a trial court may require the press and public to justify their right to attend a judicial proceeding.

By shifting this burden to the press, courts in New York State are now relieved of their duty to ascertain whether public disclosure of certain facts will actually create impermissible juror partiality in violation of the defendant's right to a fair trial. Instead, a conclusory allegation "that there [is] indeed a risk that pretrial news account . . . [will] have some adverse impact on the attitudes of . . . jurors", *Nebraska Press Ass'n, supra* at 568-569, now obliges the press in New York to demonstrate that the interest of the public in facts concerning a particular proceeding transcends "mere curiosity" and is of sufficient "magnitude . . . to outweigh the risks of premature disclosures." Petition at 11a. It is respectfully submitted that this Court must resist this attempt to shift the burden of proof from the state to those who would exercise their First Amendment freedoms. Failure to do so would result in "the creation of a new, potentially pervasive exception to the settled rule of virtually blanket prohibition of prior restraints." *Nebraska Press Ass'n, supra,* at 594 (Brennan, J., concurring opinion). For the same spectre of widespread restraint inherent in judicial approval of "gag orders" based upon unspecified, conclusory grounds also exists with respect to arbitrary closures:

> "The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pre-trial publicity against his clients and pre-empt ineffective-assistance-of counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger the judges would

nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal.

* * *

And, . . . given the financial disincentives, particularly on the smaller organs of the media, to challenge any restrictive orders once they are imposed by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected." Id. at 608, 610.

Thus, the lower court's opinion constitutes a dangerous departure from established law by requiring the press to show why it should not be restrained, whenever its scrutiny of our "presumptively open" judicial system may lead to "commentary [that] would threaten the impaneling of a constitutionally impartial jury in the county of venue . . . ." Petition at 10a.

A fundamental error in the lower court's analysis giving rise to this dangerous precedent is its misconception of current standards for assessing juror impartiality or threats thereto.

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors . . . 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136. . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155 b. His verdict must be based upon the evidence developed at the trial." *Irvin* v. *Dowd,* 366 U.S. 717, 722 (1961).

Yet, the State Court of Appeals has failed to understand that

> "[i]t is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. *To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. at 722-723 (emphasis added). See also, *Nebraska Press Ass'n* v. *Stuart, supra,* at 554: ("[T]hese cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial"); *Murphy* v. *Florida,* 421 U.S. 794,799 (1975) ("[E]xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process.").[8]

Respondent, noting that there had been local publicity concerning the fugitives' confessions, adopted

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[8] Very few cases—all involving far more egregious patterns of pretrial publicity than is present herein—have equated pretrial publicity with prejudice. See *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Moreover, the "federal supervisory standard," whereby persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced, does not apply to state prosecutions. See: *Marshall* v. *United States,* 360 U.S. 310 (1959).

the "impossible standard" of presumptive prejudice adverted to in *Irvin, supra,* and, without detailed inquiry as to actual prejudice generated among the citizenry in the local venue, found the "reasonable possibility of prejudice to the defendants" to be a sufficient basis for the extraordinary act of closing to the public a judicial proceeding. In so doing, respondent clearly failed to examine in any meaningful way "(a) the nature and extent of pretrial coverage; [and] (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity. . . ." *Nebraska Press Ass'n, supra,* at 562. It must be remembered that even where a trial court may "reasonably conclude . . . that publicity might impair the defendant's right to a fair trial," Id. at 563, hurdles to the entry of an order previously restraining the collection or dissemination of news concerning judicial proceedings remain. See, *Nebraska Press Ass'n, supra,* at 564-565. Inasmuch as "[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges," Id. at 587, alternative and less drastic remedies must first be considered:

> "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966).

The First Amendment protects one of the fundamental liberties which must be accorded the broadest scope possible, consistent with maintaining an ordered society. Thus, in order to avoid the establishment of a precedent which subordinates this liberty to specula-

tive concerns as to a defendant's right to a fair trial, and which is capable of future abuse, it clearly would have been preferable to conduct the *Huntley* hearing in public and address the threat of impermissible juror prejudice at trial, where all the alternative remedies thereto would still be available, but a more searching inquiry as to juror prejudice may be conducted on *voir dire.*[4] In their haste to find an ironclad means whereby the asserted threat of juror prejudice may be prevented, Respondent and the New York Court of Appeals have run roughshod over the public's right to be informed by the press on matters of great public interest; Respondent and the New York Court of Appeals have established a precedent which, if permitted to stand, "will inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Nebraska Press Ass'n, supra,* at 607.

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[4] Oftentimes, the Court's inquiry into the voluntariness of a criminal defendant's confession or the admissibility of physical evidence can be conducted without disclosing the contents of the statement or the nature of the evidence. *U.S.* v. *Cianfrani, supra,* at 39-40. Moreover, "[i]t may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding precious rights of criminal defendants more difficult." *Nebraska Press Ass'n, supra,* at 612-613 (Brennan, J., concurring opinion). Finally, before entering an order removing a judicial proceeding from public scrutiny, the court must determine "how effectively [the] restraining order would operate to prevent the threatened danger." Id. at 562. Although the threatened danger below was the possibility that local veniremen might become impermissibly prejudiced, inasmuch as the local community was already aware of the fact that confessions had been made, closure of the *Huntley* hearing arguably could not have prevented the threatened danger as effectively as the less drastic remedies of continuance or change of venue. In any event, the necessary finding as to the efficacy of such alternative remedies was not made. *Nebraska Press Ass'n, supra,* at 562.

CONCLUSION

It is respectfully submitted that this Court grant the petition for writ of certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

Petition for Certiorari Filed March 17, 1978
Certiorari Granted May 1, 1978

Daily Record Corporation
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(3798)

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Chronological List of Important Dates

August 5, 1976	Respondents Greathouse and Jones arraigned on charges of Murder in the Second Degree, etc. before Seneca County Court Judge DePasquale.
November 4, 1976	Public and press ejected from Seneca County Court courtroom by oral order of Judge DePasquale. Pre-trial suppression hearing in case of *People of the State of New York v. Greathouse and Jones* commences.
November 5, 1976	Gannett reporter files written request for postponement of, and access to, suppression hearing. Judge DePasquale denies request, and hearing concludes.
November 8, 1976	Gannett moves, before Judge DePasquale, to vacate order of ejection and to gain access to transcript of suppression hearing.
November 9, 1976	District Attorney, Greathouse and Jones oppose Gannett motion on procedural grounds.
November 16, 1976	Argument on merits of Gannett motion permitted. Motion orally denied by Judge DePasquale.
November 17, 1976	Judge DePasquale signs written order denying Gannett motion.
November 18, 1976	Gannett, by order to show cause and petition, commences special proceeding in nature of prohibition and mandamus in the Supreme Court, Appellate Division, Fourth Department, challenging November 4 and 17, 1976 orders of Judge DePasquale.

December 17, 1976	Appellate Division issues judgment and opinion vacating orders of Judge DePasquale.
January 6, 1977	Notice of appeal to New York Court of Appeals filed.
December 19, 1977	New York Court of Appeals issues opinion and judgment modifying judgment below.
December 29, 1977	Gannett moves for reargument in New York Court of Appeals.
January 12, 1978	New York Court of Appeals denies motion for reargument.

Judgments, Orders and Opinions of the Courts Below

The oral Exclusionary Order of Seneca County Court (Judge DePasquale), dated November 4, 1976, is set forth at page 4 herein, and is unreported.

The Order to Show Cause, dated November 8, 1976, by which Gannett Co., Inc. sought to set aside the November 4, 1976 oral Exclusionary Order of Judge DePasquale, is set forth at page 42a of the Appendix to the Petition for a Writ of Certiorari, and is unreported.

The written exclusionary Order of Seneca County Court (Judge DePasquale), dated November 17, 1976, is set forth at page 11 herein, and is unreported.

The Opinion of the Supreme Court of the State of New York, Appellate Division — Fourth Department, entered December 17, 1976, is set forth at page 21a of the Appendix to the Petition for a Writ of Certiorari, and is reported at 55 AD2d 107, 389 N.Y.S.2d 719.

The Opinion and Judgment of the State of New York Court of Appeals, entered December 19, 1977, is set forth at page 2a of the Appendix to the Petition for a Writ of Certiorari, and is reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756.

The Order of the State of New York Court of Appeals denying reargument, entered January 12, 1978, is set forth at page 1a of the Appendix to the Petition for a Writ of Certiorari, and is reported at 43 NY2d 846.

Exclusionary Order of Seneca County Court,
Dated November 4, 1976

STATE OF NEW YORK COUNTY COURT:
COUNTY OF SENECA

—

THE PEOPLE OF THE STATE OF NEW YORK
—against—
DAVID RAY JONES AND AND KYLE EDWIN GREATHOUSE,

Defendants.

Indictment Nos. 76-18 and 76-19

—

MINUTES OF PROCEEDING held before HON. DANIEL A. DEPASQUALE, Seneca County Court Judge, on the 4th day of November 1976.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney
THOMAS L. JONES, ESQ., as Public Defender for Kyle Edwin Greathouse
STUART O. MILLER, ESQ., as Public Defender for David Ray Jones
DEFENDANTS, Present in person
FREDERICK MOREHOUSE, Deputy County Clerk
KAY L. ROCKWELL, Official Court Reporter

[2] MR. JONES: Before Mr. Ward proceeds, your Honor, I have two motions that I would like to direct to the procedural aspects of this proceeding. Since we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial, on behalf of the defendant Kyle Greathouse I would move that the public and the press be excluded from this hearing.

THE COURT: Mr. Miller?

MR. MILLER: Your Honor, on behalf of David Ray Jones, I make the same motion.

THE COURT: What is your second motion?

MR. JONES: The second motion, your Honor, is that other than the witness testifying at a particular time all witnesses be excluded until after they have completed their testimony.

THE COURT: All right. Now, you understand that the constitutional rights of the defendants — they are entitled to a public and speedy trial and the exclusion of the press and the public, this is being made at your request, and it [3] does abridge the rights, the constitutional rights, of the defendants?

MR. JONES: I fully understand that, your Honor, but this is not a trial, it is a hearing, and I think the dilatorious effects far outweigh the constitutional rights, and I would certainly renew that motion.

THE COURT: And you will renew for the same reasons, Mr. Miller?

MR. MILLER: My motion stands, your Honor. I have discussed this with my client, and that is my motion. I also move to exclude any and all witnesses who are not in fact testifying from the courtroom.

THE COURT: Mr. Jones, you discussed this with your defendant, Mr. Greathouse, is that correct?

MR. JONES: Yes, we have discussed procedural aspects.

THE COURT: All right. The Court is going to grant both your motions, but before I do, Mr. Ward, do you wish to be heard with respect to the motions? [4]

MR. WARD: No, your Honor. I stated earlier that I thought it was up to the defens[illegible] I would not oppose what they wished to do.

THE COURT: Therefore the Court is going to grant the motion, since these matters are in the nature of a Huntley

Exclusionary Order of Seneca County Court,
Dated November 4, 1976

hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions.

[Certification Omitted in Printing.]

Letter From Gannett Reporter to Judge DePasquale
Dated November 5, 1976

November 5, 1976

The Honorable Daniel DePasquale,
Seneca County Judge
Seneca County Courthouse
Williams Street
Waterloo, New York

Dear Judge DePasquale:

Our lawyers tell us that we have a right to cover this hearing and use our discretion as to what to publish, with all due consideration for a fair trial.

We ask that the hearing, if it is still underway, be postponed so that our attorneys can argue this point.

If the hearing has been completed, we ask to be given access to the transcript.

Thank you.

/s/ CAROL M. RITTER
Carol M. Ritter,
Seneca County Correspondent
Gannett Rochester Newspapers

Letter From Judge DePasquale to Gannett Reporter
Dated November 5, 1976

[Letterhead Omitted in Printing]

November 5, 1976

Ms. Carol M. Ritter
79 E. Bayard Street
Seneca Falls, New York 13148

RE: Peo. vs. Kyle Edwin Greathouse
Peo. vs. David Ray Jones

Dear Ms. Ritter:

This is to acknowledge your letter of November 5, 1976, which I received from my Court Attendant at approximately 2:58 P.M. today while I was on the bench presiding over the above-entitled matters.

Unfortunately, the Hearing concluded about 3:08 P.M. so there was no time for your Newspaper's attorneys to argue the point of the Press covering the proceedings.

Please be advised that following the close of the proofs, the Court reserved decision. Under no circumstances, therefore, will a transcript be made available to you before I have rendered my decision, at which time you may renew your request for a transcript through your attorney in the form of a Motion. Prior to my decision being rendered, your attorneys may possibly consider bringing on an Article 78 Proceeding in Supreme Court to compel the Court to provide said transcript.

Trusting the above will be of some assistance to you, I remain,

Very truly yours,

/s/ DANIEL A. DePASQUALE
DANIEL A. DePASQUALE
Seneca County Judge, Surrogate
and Family Court Judge

DAD:B
cc: Stuart Dunham

[Order to Show Cause, dated November 8, 1978, by which Gannett Co., Inc. sought to set aside the November 4, 1976 Exclusionary Order of Judge DePasquale,is set forth at page 42a of the Appendix to the Petition for a Writ of Certiorari.]

Transcript of Proceedings in Seneca County Court
on November 9, 1976

[Title Omitted in Printing]

Proceedings held before HON. DANIEL A. DePASQUALE, Seneca County Court Judge, on the 9th day of November 1976 in the Seneca County Courthouse at Waterloo, New York.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney

THOMAS L. JONES, ESQ., as Public Defender for defendant, Kyle Edwin Greathouse

STUART O. MILLER, ESQ., as Public Defender for defendant, David Ray Jones

ROBERT C. BERNIUS, ESQ., Attorney for Gannett Co., Inc.

KAY L. ROCKWELL, Official Court Reporter

[2] THE COURT: This problem is going to arise in the future, and that is the reason why it is a judicial issue, and not only in this proceeding but in future proceedings in this court and in other courts. There definitely is an adverse interest here, definitely you are adversely affected by it — you will have to demonstrate that fact, but your position is that you are adversely affected and that you have a right to be heard. This I tend to agree with, and I am going to hold this motion for a time, and I will make known to all of the parties and the attorneys here when, if any, arguments are going to be heard with respect to this motion.

What I am saying, in effect, is that I am reserving decision on your motion to dismiss, gentlemen. It is as simple as that.

MR. BERNIUS: Your Honor, could you give us an occasion when we might argue this on the merits? If you wish, I am

prepared to argue the merits of it right now rather than come back.

THE COURT: I think we all should be clear on what we are going to be doing in [3] in [*sic*] the future, and I am either going to allow the motion to be heard or I am not going to allow the motion to be heard in this court. It is as simple as that, one way or the other, so there is not really anything anyone has to do at this time, and it is going to be the Court's decision to make as to whether the motion is going to be heard in light of everything that is before the Court — the order to show cause, what has happened here this morning, and taking into consideration the motion for dismissal and your addressing yourself to this motion. With that, we will stand adjourned until another time.

MR. BERNIUS: Your Honor, is there a date for the adjournment?

THE COURT: No, I will give you notice as to when a decision is made.

MR. BERNIUS: Thank you.

[Certification omitted in Printing]

Exclusionary Order of Seneca County Court, Dated November 17, 1976

[Title Omitted in Printing]

ORDER

INDICTMENTS 76-18, 76-19

—

Upon the motion of Gannett Co., Inc., brought by Order to Show Cause and an affidavit in support thereof dated November 8, 1976, to vacate the previous order of this Court which precluded the public and reporters and representatives of Gannett Co., Inc. from attending the suppression hearing held herein pursuant to Article 710 of the Criminal Procedure Law; to admit said individuals to said hearing *nunc pro tunc* as of its commencement; and to grant to Gannett Co., Inc., its reporters and representatives access to the transcript of said hearing immediately upon the completion of said transcript; and after hearing argument on November 9, 1976 and November 16, 1976 by Nixon, Hargrave, Devans & Doyle, Robert C. Bernius, of counsel, on behalf of Gannett Co., Inc., in support of said motion; and by Thomas Jones, attorney for defendant Greathouse; Stuart Miller, attorney for defendant Jones; and the Seneca [2] County District Attorney, all three of whom appeared specially in opposition thereto; it is hereby:

1. Ordered, that the motion is in all respects denied; and it is further

2. Ordered, that the suppression hearing conducted by this Court on November 4-5, 1976 is to be closed to the public for the reasons appearing in the transcript of the oral decision of the Court annexed hereto; and it is further

Exclusionary Order of Seneca County Court, Dated November 17, 1976

3. Ordered, that the application of Gannett Co., Inc. for access to the transcript of said suppression hearing upon the completion of said transcript, is denied, ~~pending completion of the trial herein,~~ for the reasons specified in the transcript of the oral decision annexed hereto and made a part hereof.

Dated: November 17, 1976

ENTER:

/s/ Daniel A. DePasquale

HON. DANIEL A. DEPASQUALE
County Court Judge

/s/ Stuart O. Miller 11/17/76
/s/ Walter J. Ward 11/17/76
/s/ Thomas L. Jones 11/17/76
/s/ Robert C. Bernius 11/17/76

Transcript of Proceedings in Seneca County Court, Dated November 16, 1976, Incorporated Into Exclusionary Order of November 17, 1976

[Title Omitted in Printing]

Proceedings held before HON. DANIEL A. DEPASQUALE, Seneca County Court Judge, on the 16th day of November 1976 in the Seneca County Courthouse at Waterloo, New York.

APPEARANCES:

WALTER J. WARD, ESQ., District Attorney

THOMAS L. JONES, ESQ., as Public Defender for defendant, Kyle Edwin Greathouse

STUART O. MILLER, ESQ., as Public Defender for defendant, David Ray Jones

ROBERT C. BERNIUS, ESQ., Attorney for Gannett Co., Inc.

KAY L. ROCKWELL, Official Court Reporter

[2] THE COURT: The Court has listened to the arguments and it has filed the memorandum of law which you handed up to the Court, Mr. Bernius. It occurs to this Court that the hearing to which your paper chooses to intervene has already concluded, and the only thing that remains from the hearing is the decision of this Court, to which you concede, and very readily concede, that that is not to be made available. The decision is not to be made available to the press, to the public, but only to counsel.

It is very unfortunate that you were not here when the motion was made, but the motion was made and it was made with the moving force behind the motion being the rights of the defendants to a fair trial. It was alluded to by counsel that since this was a suppression hearing and certain evidentiary matters may have been testified to, and had they been reported by the press,

the defendants would not be able to get a fair trial. The Court in granting the motion — which motion was joined in by the District Attorney or it was without objection from the District Attorney — was granted by the Court on [3] the theory that under the special and unusual circumstances — one of these two defendants being 16 years of age — that there was a reasonable probability of of [*sic*] prejudice to the defendants, and the Court therefore found it necessary to grant the motion.

Now the issue is whether there should be a transcript afforded to the press prior to the decision being rendered. The Court is faced with that decision as to whether a transcript of the proceedings would be made available to the press at this point, or to the Gannett Company, because unfortunately the hearing had been concluded prior to your intervention, and the Court has afforded the Gannett Company a forum to be heard relative to its motion excluding the public and the press.

The Court has had a brief opportunity to study the memorandum of law which you submitted, Mr. Bernius, and point two is a point that the Court finds very much a point that may not be very easily decided, because, "There is inadequate factual basis for exclusion of the public and press." I have not had an opportunity to study the authorities that you cite. Should this burden be placed on the [4] defendants who choose to abridge their own constitutional rights for the sake of their concern and their rights to a fair trial? I do not believe that there are any authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press.

This is going back to what I stated in the very beginning, that it seemed to this Court that there was a reasonable probability of prejudice to these defendants. Nothing that you said in your

oral arguments — I have not examined each and every case which you cited — but there is nothing that you said here, I do not believe, that would change that. This Court still believes that there was a reasonable probability of prejudice to these defendants had the press and the public not been excluded. The Court has afforded the Gannett papers an opportunity to intervene and come in and be heard with respect to the motion which the Court granted. Rather than make a hasty decision — and the Court is inclined — perhaps from remarks that have already been made by the Court, that it has carefully [5] reconsidered the motion which was made on behalf of the defendants, and there is no real moving force for this Court to change its ruling on the motion, taking into consideration, of course, all of the facts and circumstances and everything that has been before this Court including what has happened here this morning. Actually, the urging by the Gannett newspapers for this Court to reverse its decision, there is no real basis for it.

In light of the facts and circumstances of this case, let me say this, that this Court has very sparingly invoked the rule of excluding the public and the press from any hearings and any trials happening in this particular court. There is nothing that has been presented, really, with any basis for changing, or the fact that when the particular motion was made that the Court granted the motion based on the reasonable probability of prejudice to the defendant. However, the Court will study the memorandum of law and may be arriving at a different conclusion after examining the authorities. I want to give you every benefit of the doubt here, so I will take the time to go over [6] your brief and the authorities that you have cited and go over the authorities that the attorneys for the defense and the District Attorney cited.

If you would like to address yourself to what I have stated, you may, Mr. Bernius, because I do want to make a decision here that is in all fairness. I want to very carefully balance the rights of the public to know and the defendants' rights to a fair trial, and this is actually what this Court is very concerned about.

MR. BERNIUS: Your Honor, the press and the public have the constitutional right to attend this proceeding. There must be a showing, a factual showing, sufficient to overcome that right, which means that the presence of the public and the press, which in some specific manner establish a compelling necessity having a direct adverse impact upon the proceeding of a substantial magnitude [*sic*]. Secondly, there must be a factual showing that there are no alternative means of remedying that problem, and the only thing that has been mentioned today, both by counsel and with all due respect by the Court, is that there is a [7] reasonable probability that the defendants' case would be prejudiced. With all due respect, your Honor, no one has said why the defendants' would be prejudiced by the press. In fact, Mr. Jones has suggested that there is an alternative remedy, which would be a change of venue.

We are laboring in the dark, your Honor, and I would ask your Honor to put on the record why there are no alternative remedies and how the defendants would be prejudiced in order that we could make a determination whether or not we would feel that that would be a sufficient reason for excluding us. In the case of an undercover officer whose life was threatened, fine, but we have nothing at this point, your Honor. There is no order.

THE COURT: There was no trial on the date of the hearing of the matter. It was a suppression hearing, and the hearing had been concluded when you or your newspaper chose to intervene

— or just short of its conclusion by a matter of minutes — and now the Gannett papers come in after the hearing is concluded to request a transcript of the proceedings. As counsel stated, [8] after the conclusion of the hearing the only thing left that remains is the decision to be made with respect to the admissibility of the evidence, to which you conceded that there is no right to. So to come in after the conclusion of the hearing to request the defendants to show some factual basis, you cannot put that burden upon a defendant. A motion has to be ruled upon when it is made — then and there at the time that it is made.

The Gannett newspapers knew that the matter was scheduled for a hearing, they did have an opportunity to have counsel present on that particular morning that the motion was made, and unfortunately there was no representative of the Gannett newspapers. There may have been a reporter present in your newspaper who was excluded, but following the conclusion of the hearing — then to say, "Well, let's put the burden on these defendants to show on a factual basis where they are going to be prejudiced," is being unreasonable. You have to go back to when the motion was made, and at the time the motion was made, it was made on behalf of the defendants who were facing very serious charges, [9] and as counsel stated, it was a sensitive hearing. With the age of the defendants and everything being taken into consideration and the fact that the People were joining in, or not objecting to the motion, the Court at that time ruled on the motion, and the basis for its ruling being that there was a reasonable probability of prejudice to the defendants.

The Court is well aware of the constitutional rights of the press and of the public and of the defendants, and it has tried to afford you every opportunity to reconsider its decision in light of the authorities. I think we are faced with a very unique situation

Transcript of Proceedings, Dated November 16, 1976
Incorporated Into Exclusionary Order of November 17, 1976

here, and a very special set of circumstances that we are faced with. For that reason, there is not anything that you have presented to this Court for it to reverse its decision that was previously made. Again, this brief could have been presented to the Court at some time, perhaps earlier, for its consideration. The Court has had an opportunity to very cursorily examine the memorandum of law, but has noted the authorities cited and the Court has read these cases and is very familiar with them. Very frankly, the Court does not find any [10] reason to reverse its decision that was made at the time the hearing commenced.

MR. BERNIUS: Your Honor, do I take it that you are also denying our application for a transcript?

THE COURT: As I stated in a letter, I think the transcript is all in together with the denial of the motion and the Court not reversing its decision. That is the decision of this Court.

MR. BERNIUS: May I submit an order or should I order a copy of this transcript to serve as the basis for an order in the case concerning our application?

THE COURT: You may submit an order and along with that the record of these proceedings, if you would like.

MR. BERNIUS: Again, there is a delay, and, your Honor, each day that passes is in our estimation an injury to the press. It is now 12:15, and if it is all right with your Honor, perhaps early this afternoon I could submit an order for your signature in lieu of having to wait for a [11] transcript of these proceedings.

THE COURT: I think that should be part of the order. The oral decision from the bench should be part of the order.

[Certification Omitted in Printing]

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FOURTH DEPARTMENT

In the Matter of
The Application of
GANNETT CO., INC.,

Petitioner,

• • •

–against –

HON. DANIEL A. DE PASQUALE, as Judge of the Seneca County Court,
KYLE EDWIN GREATHOUSE, DAVID RAY JONES, and
WALTER J. WARD, as District Attorney of Seneca County,

Respondents.

ORDER TO SHOW CAUSE AND STAY

Upon the annexed Petition herein, it is hereby:

ORDERED that Respondents Hon. Daniel A. DePasquale, as Seneca County Court Judge; Walter J. Ward, as District Attorney of Seneca County; Kyle Edwin Greathouse and David Jones show cause at a Term of this Court to be held at the Hall of Justice, Rochester, New York on the 6th day of December, 1976, at 10 A.M. or as soon thereafter as counsel can be heard, why a judgment should not be made and entered herein, pursuant to CPLR Article 78, vacating and prohibiting enforcement of the oral Order, dated November 4, 1976, of Hon. Daniel A. DePasquale which excluded the public and press from attendance at the pre-trial suppression hearing in the matter of *People v. Kyle Edwin Greathouse and David Ray Jones*, and

further vacating and prohibiting enforcement of the Order, dated November 17, 1976, of Hon. Daniel A. DePasquale in the matter of *People v. Kyle Edwin Greathouse and David Ray Jones*, which Order denies Petitioner's motion to be admitted, *nunc pro tunc* as of its commencement, to the suppression hearing conducted in Seneca County Court on November 4-5, 1976; denies Petitioner's motion for access to the stenographic transcript of said hearing; and denies Petitioner's motion to vacate the aforementioned oral Order of said court dated November 4, 1976; and it is further

ORDERED that Respondents shall serve and file their verified answers and other written proof on or before November 24th, 1976; that all memoranda of law in behalf of any party shall be served and filed with the Court on or before November 29th, 1976, and that all reply memoranda be served and filed with the Court on or before December 3rd, 1976; and it is further • • •

ORDERED that service by mail of this Order to Show Cause, together with the papers submitted in support thereof, upon the office of Respondent Hon. Daniel A. DePasquale; upon the office of Stuart O. Miller, Esq., attorney for Respondent David Jones, upon the office of Thomas L. Jones, Esq., attorney for Respondent Greathouse; and upon the office of Respondent Ward on or before the 22nd day of Novemb r, 1976 shall be deemed good and sufficient service.

Dated: November 18, 1976

/s/ Harry D. Goldman
Justice, Appellate Division,
Fourth Department

[Title Omitted in Printing]

PETITION

The Petition of Gannett Co., Inc. (hereinafter "Petitioner") seeks relief in the nature of a writ of prohibition and mandamus, pursuant to CPLR Article 78, vacating and prohibiting enforcement of the oral Order, dated November 4, 1976, of Hon. Daniel A. DePasquale which excluded the public and press from attendance at the pre-trial suppression hearing in the matter of *People v. Kyle Edwin Greathouse and David Ray Jones*, and further vacating and prohibiting enforcement of the Order, dated November 17, [2] 1976, of Hon. Daniel A. DePasquale in the matter of *People v. Kyle Edwin Greathouse and David Ray Jones*, which Order denies Petitioner's motion to be admitted, *nunc pro tunc* as of its commencement, to the suppression hearing conducted in Seneca County Court on November 4-5, 1976; denies Petitioner's motion for access to the stenographic transcript of said hearing; and denies Petitioner's motion to vacate the aforementioned oral Order of said court dated November 4, 1976; [hereinafter "Orders"]. The Petition respectfully alleges upon information and belief:

Parties

1. Petitioner is a public corporation, duly incorporated and existing under the laws of the State of Delaware, with its principal offices located at 55 Exchange Street, Rochester, New York.

2. Petitioner owns and operates, *inter alia*, the following newspapers and television stations:

a. *The Democrat and Chronicle*, a morning daily newspaper of general circulation in the greater Rochester area (including Seneca County), published in Rochester, New York.

b. *The Times Union*, an afternoon daily newspaper of general circulation in the greater Rochester area (including Seneca County) published in Rochester, New York.

[3] c. Channel 10-T.V., a VHF television station broadcasting in Rochester, New York.

3. Respondent Hon. Daniel A. DePasquale (hereinafter "Judge DePasquale") is a County Court Judge for the County of Seneca and is in that capacity presiding in the criminal proceedings being held in County Court, Seneca County, in the case of *People v. Kyle Edwin Greathouse and David Ray Jones*, Seneca County Indictments 76-18, 76-19, which involve charges of Murder in the Second Degree, Robbery in the First Degree, and Grand Larceny in the Second and Third Degrees (hereinafter "the Criminal Case"). Judge DePasquale presided in said Court during a pre-trial suppression hearing held in the Criminal Case on November 4-5, 1976.

4. Respondents Kyle Edwin Greathouse and David Ray Jones (hereinafter "defendants") are the defendants in the Criminal Case. Defendants, by their attorneys, filed a motion, pursuant to CPL Article 710, to suppress certain statements attributable to them in the Criminal Case, and on November 4, 1976, requested that the suppression hearing in the Criminal Case be conducted with the public and press excluded.

5. Respondent Walter J. Ward is District Attorney of Seneca County and in that capacity represents the People of the State of New York in the Criminal Case. Respondent Ward originally acquiesced in, and now supports, the position of defendants with respect to closure of the courtroom.

Background

[4] 6. On or about August 2, 1976, defendants were accused by a Seneca County Grand Jury of Murder in the Second Degree, Robbery in the First Degree, Grand Larceny in the Second Degree, and Grand Larceny in the Third Degree (Seneca County Indictments 76-18, 76-19).

7. The charges and the events preceding them were the subject of great public interest. Accordingly, Petitioner assigned a number of reporters to cover both the investigation of the alleged crime and the legal proceedings in the Criminal Case subsequent to the arrest of defendants.

8. Petitioner and its reporters expended great amounts of time, effort and other resources in observing and reporting the investigation of the crimes alleged, as well as the pre-trial proceedings attendant to the Criminal Case. Samples of the articles written on the subject by representatives of Petitioner (who observed the criminal investigation and the pre-trial proceedings in the Criminal Case), and published by Petitioner, are attached to this Petition as Exhibits "B-1" through "B-16." In addition, the criminal investigation and the Criminal Case were the subject of numerous articles and reports by news media other than those of Petitioner, a sample of which is attached to this Petition as Exhibit "B-17."

[5] 9. The crimes allegedly committed by defendants involve the purported murder and robbery of a former Brighton, New York policeman, Wayne Clapp, who, according to police, was taken by the defendants onto Seneca Lake and there killed by them. The matter generated intensive public interest for several reasons including the failure of authorities to recover the body of Officer Clapp. (Exh. B-1, B-2).

10. The police initially experienced difficulty in apprehending the individuals suspected of the crime, and, through Petitioner's reporters and news articles, appealed to the public at large for assistance in solving it. (Exh. B-2).

11. Defendants were, on July 21, 1976, arrested in Michigan for the commission of the alleged crime. The extradition of Defendant Greathouse, according to State Police authorities, involved unique legal problems (Exh. B-5, B-7).

12. Following the return of defendants to New York and their indictment by the Seneca County Grand Jury, Respondent Ward indicated that the Criminal Case was unique in the annals of New York jurisprudence in that the *corpus* of the alleged crime has never been recovered: Officer Clapp's body is still missing. (Exh. B-10).

13. At the arraignment of defendants on August 5, 1976, their attorneys requested an additional 45-days beyond the statutory period in which to make pre-trial motions, citing the "complexity of the case" and "novel circumstances" present therein. [6] (Exh. B-13, B-14). Thereafter, defendants made pre-trial motions to suppress evidence, pursuant to CPL Article 710.

14. Upon information and belief, any statements made by defendants to law enforcement officials or their agents, and any physical evidence seized from defendants, all of which would necessarily have been the subjects of the suppression hearing herein, assume especial importance in the Criminal Case because of the absence of a *corpus*, and the judicial determination of their admissibility may be determinative of the Criminal Case.

15. Defendants' pre-trial motions to suppress evidence raise issues of serious and legitimate public concern, including, necessarily, allegations of improprieties and overreaching on the part of law enforcement officials in a serious criminal case which has legal aspects and factual circumstances of intense public interest. Accordingly, Petitioner assigned a reporter to attend and to report on the evidentiary hearing.

The Orders

16. On November 4, 1976, at the time appointed for the commencement of the hearing on defendants' motions to suppress evidence, Petitioner appeared through its news reporter, Carol Ritter.

[7] 17. Prior to the commencement of the hearing on defendants' pre-trial motions on November 4, defendants made an oral motion to exclude the public and the press therefrom, which Judge DePasquale immediately orally granted. The entire colloquy surrounding defendants' motion is as follows:

[Text omitted in printing and reproduced at pages 4-6 of this Appendix.]

[8] 18. Pursuant to Judge DePasquale's instructions, representatives of the press, including Ms. Ritter, and the public were removed from the courtroom.

19. Upon information and belief, the suppression hearing thereupon commenced and testimony was taken therein. During the pendency of the hearing, Ms. Ritter was able to secure the advice of legal counsel, and on Friday, November 5, 1976, sub-[9] mitted a written request to Judge DePasquale to postpone the hearing to permit attorneys from Petitioner to argue on her behalf, and to be given access to transcripts of any testimony already completed (Exhibit "D").

20. Judge DePasquale orally and by letter (Exhibit "E") denied her request, and the hearing continued to its conclusion closed to the public and to the press.

21. On Monday morning, November 8, 1976, an attorney for Gannett Co., Inc. appeared before Judge DePasquale and asked to be permitted to be heard on behalf of the Gannett Co., Inc. concerning the exclusion of the public from the hearing. Judge DePasquale thereafter signed an Order to Show Cause (Exhibit "F"), returnable on November 9, 1976, which directed the defendants and Respondent Ward to show cause why Gannett Co., Inc. employees and reporters should not be allowed immediate access to transcripts of the suppression hearing immediately upon their completion, and why the prior oral order of Judge DePasquale barring the press and public from the hearing should not be vacated *nunc pro tunc* as of November 3, 1976.

22. On November 9, 1976, the attorneys for the defendants and Respondent Ward appeared "specially" and opposed, on procedural grounds, the remedies sought by Petitioner in its Order to Show Cause. Although permitted to respond to the procedural issues raised, Petitioner was not permitted either to [10] argue orally or submit papers concerning the merits of its position. Judge DePasquale reserved decision on the question of whether he would permit argument on the merits, and adjourned the matter indefinitely. (Exhibit "G").

23. On November 12, 1976, Judge DePasquale informed the parties by telephone that he would permit arguments on the merits to be made on November 16, 1976.

24. On November 16, 1976, oral argument on the merits of Petitioner's claims took place in Seneca County Court. Petitioner's argument was rejected by Judge DePasquale from

the bench, and Petitioner was instructed by Judge DePasquale to include a transcript of that oral decision in any submitted order. (Exh. "H"). Said transcript was immediately ordered by Petitioner, but was not obtained until November 17, 1976.

25. On November 17, 1976, Judge DePasquale, after obtaining the approval of all counsel as to its form, signed the written Order which Petitioner seeks to vacate and prohibit enforcement of herein (Exhibit "A").

Basis for Relief

26. Petitioner commences this proceeding, which is in the nature of a writ of prohibition and mandamus, pursuant to Article 78 of the Civil Practice Law and Rules. The proceeding is commenced in this Court pursuant to CPLR § 506 (b) (1).

[11] 27. Petitioner seeks to prohibit enforcement of and vacate the Orders of Judge DePasquale dated November 4, 1976 and November 17, 1976. Petitioner cannot review said Orders by appeal to a court or to any other body or officer, and has exhausted its remedies before Judge DePasquale.

28. Petitioner, on behalf of itself and as representative of the public at large, respectfully submits that the Orders of Judge DePasquale were in excess of his jurisdiction, were made in violation of lawful procedure, were affected by an error of law, were an abuse of discretion, and were arbitrary and capricious in that:

a. the Orders are directly contrary to the provision of Section 4 of the Judiciary Law which provides, with certain exceptions here inapplicable, that the "sittings of every court within this state shall be public, and every citizen may freely attend the same," and

b the Orders violate the guarantee to Petitioner, and to the public at large, of a public trial secured by the Sixth and Fourteenth Amendments to the United States Constitution, and are, moreover, an abridgement of the freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution, and

c. the Orders further violate Article 1, Sections 6 and 8 of the Constitution of the State of New York, and [12] Civil Rights Law § 12, which afford guarantees similar to those aforementioned, and

d. the proceedings which culminated in the issuance of the Orders denied to Petitioner due process of law.

29. The Orders apply specifically and directly to Petitioner and its representatives, and unless vacated will immediately and irreparably abrogate the rights guaranteed to Petitioner and to the public at large as set forth above.

30. Upon information and belief, the abrogation of these constitutional and statutory rights of Petitioner is authorized, if at all, only after notice and an opportunity to be heard, after a clear and unequivocal evidentiary showing that the limitation of such rights is necessary to ensure a defendant a fair trial or that there exists a demonstrable clear and present danger to a witness, and after a finding that there is no alternative remedy available to the Court.

31. Petitioner was not given notice or an opportunity to be heard prior to the infringement of its rights.

32. No evidentiary showing was made to Judge DePasquale sufficient to abrogate the constitutional and statutory rights of Petitioner and the public in general.

33. Judge DePasquale made no finding of fact which would justify the abrogation of the aforementioned rights of Petitioner and the public.

[13] 34. Upon information and belief, there are no facts which support the Orders of Judge DePasquale.

35. Accordingly, Petitioner believes that insofar as they close the hearing on the suppression motion to the public and the press, including the Petitioner, the Orders are arbitrary and capricious, constitute an abuse of discretion, are beyond the legal authority of the Court, are based upon an error of law and abrogate Petitioner's constitutionally protected rights to freedom of speech, freedom of the press, a public trial, and due process of law.

36. Petitioner will suffer irreparable harm if the Orders are not vacated immediately.

37. Petitioner has no adequate remedy other than this proceeding, and no previous application for the within requested relief has been made.

WHEREFORE, Petitioner respectfully requests this Court to:

1. Stay enforcement of the Order of November 17 insofar as it prevents the public, the press and Petitioner from access to the transcript of the suppression hearing held in the Criminal Case pending a determination on the merits of this proceeding, and

2. Grant judgment: prohibiting enforcement of, and vacating, the Orders of November 4 and November 17, 1976; directing [14] Respondents to admit Petitioner and the public to the suppression hearing held November 4-5, 1976 in the Criminal Case, *nunc pro tunc* as of its commencement; and directing that Petitioner be provided with a copy of the transcript of said suppression hearing, and

3. Grant such other and further relief as the Court may deem appropriate.

Dated: November 18, 1976

NIXON, HARGRAVE, DEVANS
& DOYLE
Attorney for Petitioner
Office and Post Office Address
Lincoln First Tower
Rochester, New York 14603
(716) 546-8000

ATTORNEY'S VERIFICATION

State of New York
County of Monroe SS:
City of Rochester

ROBERT C. BERNIUS, being duly sworn, deposes and says:

1. That he is an attorney at law associated with Nixon, Hargrave, Devans & Doyle, attorneys for the Petitioner in the within action; that the allegations of paragraphs 21 through 28 of the foregoing Petition are true of his own knowledge; and that the reason this verification of paragraphs 21 through 28 of the Petition is made by deponent and not by the Petitioner is that all the material allegations of paragraphs 21 through 28 of said Petition are within the personal knowledge of deponent.

2. That the Petitioner is a corporation created under and by virtue of the laws of the State of Delaware, and that the matters stated in paragraphs 1 through 20 and 29 through 37 of the Petition are believed to be true. Deponent further says that the grounds of his belief as to the matters stated in paragraphs 1 through 20 and 29 through 37 of the petition are derived from official court records, Petitioner's records, public records, conversations with Petitioner's employees and attorneys, stenographic transcripts of court proceedings, and statutory and case law of New York State and the United States. The reason why this verification of paragraphs 1 through 20 and 29 through 37 of the Petition is not made by the Petitioner is that the said Petitioner is a foreign corporation.

/s/ ROBERT C. BERNIUS

Robert C. Bernius

[Notarization Omitted in Printing]

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

[Exhibit "A" to Petition is omitted in printing, and appears at pages 11 through 18 of this Appendix]

Exhibit B-1

Henrietta
JUL 20 1976 3C

fisherman feared dead

State police yesterday were searching for two men in connection with the disappearance of a Henrietta man Friday night.

State Police in Canandaigua issued an alarm yesterday for Kyle E. Greathouse, age and address unknown, and another man.

State troopers said they believe William F. Clapp, 30 Garden Parkway, Henrietta, was shot while fishing with the two men on Seneca Lake Friday.

Police said Clapp was last seen Friday evening at Japp's Marina in Geneva when he left in his boat to go fishing with two men. The two men were later seen returning in the boat and driving away in Clapp's blue pickup truck, police said.

Police said an investigation turned up evidence that Clapp had been shot while on the boat. A team of six divers will continue looking for a body in the lake today.

Clapp, a former Brighton police man, had been working as a dispatcher for the Brighton Highway Department.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-2

Copter Searches Seneca Lake For Man Feared Murdered

JUL 20 1976 1C

A State Police helicopter was searching the northern portion of Seneca Lake today for a Henrietta man who is missing and feared murdered.



WAYNE CLAPP
. . . *1959 photo*

Wayne Clapp, 42, of 30 Garden Parkway, Henrietta, was reported missing yesterday after he failed to return from a boating trip on the lake.

State Police in Waterloo, Seneca County, said they are investigating the incident "under the belief that Clapp has been murdered."

State Police said they are seeking Kyle E. Greathouse and his wife, Mary Lee, both 16, and David R. Jones, 21. Addresses were not given.

Kyle Greathouse was identified as one of two companions who accompanied Clapp Friday on a fishing trip on the lake in Clapp's boat, Jaws.

Clapp has not been seen since the boat left the Roy Japp Marina, just south of Geneva on Route 14, police said.

Police said Greathouse and a companion were seen leaving the marina Friday evening in Clapp's blue pickup truck, described as a 1973 Ford with white top.

State Police said evidence found on the boat yesterday "indicated Clapp was shot while on the boat."

They have asked that anyone with information contact State Police at Waterloo or Canandaigua.

Clapp, a former Brighton policeman, was an employe of the Brighton Highway Department.

Questioned in Apparent Slaying

hold three in disappearance of Henrietta man

JUL 22 1976 TU

By MIKE SHORE

State Police detectives were in Michigan today to interview three suspects in an effort to learn the motive for the apparent slaying of a Henrietta man.

The suspects, a teenage couple and their 21-year-old companion, were arrested by Michigan authorities after a two-county search with helicopters and tracking dogs last night.

Two of them, Kyle Edwin Greathouse, 16, of San Antonio, Tex., and David R. Jones, 21, of South Carolina, were arrested on warrants charging them with the murder of Wayne E. Clapp, 42, of 30 Garden Parkway, Henrietta.

Clapp's body is believed to be somewhere in Seneca Lake and is being sought by State Police scuba divers.

The third suspect, Marilea Dienglewicz, 16, also of San Antonio, is wanted in connection with the theft of Clapp's pickup truck. Police said the woman has been using the name of Mrs. Greathouse.

A warrant charging her with grand larceny has been issued by authorities in Seneca County.

The three suspects were apprehended after a sheriff's deputy in Jackson County, Mich., made a routine license check yesterday afternoon while patrolling a small county park. (Jackson County is about 100 miles southwest of Detroit.)

State Police here had issued a nationwide pickup order for Clapp's truck.

Jones was arrested at the park and taken into custody.

A search was begun in the park for Greathouse and Miss Dienglewicz. Police used helicopters and dogs in the search. After three hours it was learned the couple might be in a motel in the next county.

The motel was surrounded and other residents evacuated, police said, but the two teenagers had escaped into nearby woods.

After more searching Miss Dienglewicz gave herself up and told police she would talk on a bullhorn to ask Greathouse to surrender, Jackson County Sheriff's detectives said.

Michigan authorities said Greathouse told them he was afraid he would be shot and sent the woman out first.

(Continued on 2B)

[Exhibit B-3 Continued on Next Page]

3 Questioned in Apparent Death

(Continued from 1B)

State Police here say they still are unsure of the motive for Clapp's murder. "We know he carried large sums of money with him," said senior investigator David Luitweiler. "There's a good possibility robbery might be involved.

Police theorize Clapp was shot with his own pistol partly because lakeshore residents reported hearing shots. Clapp's pistol is missing.

Luitweiler said Greathouse and Jones were seen leaving on a fishing trip with Clapp Friday night. He said the two returned on Clapp's 23-foot boat alone and drove off in Clapp's truck.

Police said they were hampered in their investigation because it wasn't until Monday that Clapp was reported missing by relatives. The murders had a 48-hour jump on us and we didn't know where they had gone, said Luitweiler.

San Antonio police said a missing person report had been filed on Miss Dienglewicz by her father on June 25. Members of her family declined to talk with a reporter except to say they thought she had married Greathouse and was traveling with him in the eastern part of the country.

Clapp's father, Morley, said he believes his son was murdered for money. "He got paid Wednesday and went down to the lake Thursday," Clapp said. "He might have been carrying $100 or $200 with him."

Clapp said his son frequently invited people to go fishing with him on his boat, nicknamed "Jaws." "He was outward-going and liked to give people a good time," Clapp said.

Clapp was born in Rochester and was graduated from Monroe High School. He served four years in the Air Force before joining the Brighton Police Department. He was a patrolman for 14 years before quitting to start work for the Brighton Town Highway Department.

Beside his father he is survived by his mother Marian; four brothers, Morley Jr. of San Diego, Gary of Brighton, Ralph of Rush and Warren of Livonia; and two sisters, Mrs. Marilyn Mapes of Henrietta and Mrs. Sharon Eichele of Rush.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-4

Michigan police hold 3 of Henrietta man in Seneca disappearance

JUL 22 1976 DC

By CHARLES WILSON
Regional News Service

Michigan police yesterday were holding two murder suspects and a girl teenager in the disappearance of a Henrietta man.

David R. Jones, 21, of South Carolina, wanted for second-degree murder in the disappearance of former Brighton police officer Wayne F. Clapp, was arrested about 3 p.m. in Spring Arbor Township, Mich.

Kyle Edwin Greathouse, 16, of San Antonio, Tex., and Marilea Dienglewicz, 16, also of San Antonio, were arrested shortly after 10 p.m. near Homer, Mich., about 25 miles west of Jackson.

Jackson County, Mich., Sheriff's Dept. Sgt. Michael Watkins said a deputy spotted a truck with New York State license plates while on routine patrol at Lime Lake County Park. A computer check revealed that Jones was wanted in New York State on murder charges.

The truck, which is registered to Clapp, was last seen near Geneva Friday.

Michigan state police and Jackson County deputies searched the area for five hours for Greathouse and Miss Dienglewicz.

Clapp, 42, was last seen leaving Roy's Marina south of Geneva on his boat, "Jaws," with Greathouse and Jones Friday afternoon, state police in Waterloo said. Witnesses saw the boat return in the evening without Clapp, state police said. Shortly after, Greathouse, Jones and Miss Dienglewicz were seen leaving together.

Warrants charging Greathouse and Jones with second-degree murder were issued Tuesday by Waterloo Town Justice Peter Bodine, who also named all three in warrants charging grand larceny in the theft of the truck.

Seneca County District Attorney Walter J. Ward said yesterday that he was notified Michigan officials he will seek extradition. ward said he feels he will be able to prosecute a homicide charge even if Clapp's body isn't found.

Ward said however, that evidence in the case is still developing and "the case could change."

State police yesterday continued a search of Seneca Lake, sending divers to depths of more than 100 feet, but did not find anything.

State Police have been investigating the case since early Monday. Police said evidence on Clapp's 25-foot boat indicated that he had been shot.

Waterloo Bureau of Criminal Investigation officers John Schermerhorn and John Eno were enroute to Michigan last night.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-5

Suspect (3) waives JUL 23 1976 DC extradition

By CHARLES WILSON

GENEVA — One of two persons charged with murder in the apparent slaying of Wayne F. Clapp has waived extradition proceedings in Michigan and will be transferred to New York to face charges "within a day or two," State Police said last night.

David R. Jones, 21, of Anderson, S.C., will be arraigned on a charge of second-degree murder as soon as he is brought from Jackson County, Mich., to Seneca County, Capt. Richard Boland said.

Jones and two San Antonio, Tex. teenagers were arrested in Michigan Wednesday after a deputy ran a routine check on a pickup truck they were in. The truck, which is registered to Clapp, had been the subject of a nationwide police alert issued by State Police in Geneva.

Jones and Kyle E. Greathouse, 16 of San Antonio, were arrested as fugitives from warrants issued here charging them with second-degree murder.

Their 16-year-old companion, Marilea Dienglewicz (also known as Marilea Greathouse) also is in custody in Michigan as a fugitive from a warrant charging her with second-degree grand larceny in connection with the theft of Clapp's truck.

State Police Detectives John Schermerhorn and John Eno from the Waterloo Substation are in Jackson County questioning the three suspects.

Clapp, 42, a former Brighton police officer, hasn't been seen since a week ago today when he went fishing on Seneca Lake in his boat "Jaws" with two persons, identified by witnesses as Jones and Greathouse.

When the boat returned to the marina, Clapp wasn't aboard, according to witnesses. State Police have been probing the case since Monday under the "assumption" that Clapp was murdered aboard the boat. Police said that assumption is based on evidence found in the boat after Clapp was reported missing Monday, and on witnesses' reports that shots were heard out on the lake Friday evening.

Turn to Page 2B

[Exhibit B-5 Continued on Next Page]

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

MURDER SUSPECT

Exhibit B-5

From Page 1B

Boland said State Police hope to make a decision this morning about how to bring the two 16-year-olds to New York to face charges, explaining that Michigan and New York officials are still researching how extradition statutes apply to the youths.

State Police said the 16-year-olds are regarded as juveniles in the state of Michigan, but as adults in New York State where the felony crimes allegedly were committed.

The case raises an apparently unique legal question, Boland said, and officials yesterday were researching the legalities with assistance from the Jackson County District Attorney's Office.

Police are hoping to bring back the three suspects at the same time, Boland said, but plans weren't made last night because the legal question was unresolved.

Seneca County Dist. Atty. Walter J. Ward said that information in the case may be presented to the Seneca County grand jury which convenes Aug. 2, but said at this point "the entire case is not put together."

Jones and Greathouse are named in second-degree grand larceny warrants as well as the warrants charging them with murder.

If Seneca County has to initiate extradition proceedings for the two 16-year-olds, Boland said, the process would have to involve the governors of both Michigan and New York. Ward said the proceedings could be lengthy.

Jones is now being held in Jackson County Jail and the two 16-year-olds are being held in a juvenile home in that county, about 100 miles southwest of Detroit.

In addition to the Michigan investigation, Boland said authorities here are still trying to contact possible witnesses to events of last Friday from both Ontario and Seneca counties. Seneca Lake is in Seneca County jurisdiction, but Clapp was last seen leaving Roy's Marina on Route 14, just south of Geneva in Ontario County.

Yesterday, State Police used sounding instruments in the Clark's Point area of Seneca Lake in an effort to find Clapp's body. Sear by helicopter and scuba divers since Mon have failed to turn up any evidence in the c

Little is known about the three suspects b held in the case, although they stayed at Mau Lakeview Tavern — Inn across the road f Roy's Marina nearly three weeks before Henrietta man disappeared.

Annette Mauro, who owns and operates inn with her husband, said the three arri together here in early July. "They just said t liked the area," Mrs. Maura said, adding "T weren't really bad kids — they were very q and we hardly ever knew they were around."

Mrs. Mauro said the three told her they "w going to stay for a while" and planned to f employment in the area, but that during th stay they spent most of their time in their ro watching television or sitting outside. "They h no car, where else could they go?" she adde

Mrs. Mauro said the 16-year-old g apparently has an aunt living in the area v originally brought the three to the inn.

State Police said Greathouse was on probat in San Antonio, but officers didn't know details of his criminal record.

State police hope to bring the pickup tru back to New York State for further investigati Clapp's boat is already in police possession, h Michigan officials are still looking for 357-magnum revolver, which is registered Clapp, and reportedly is missing.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-6

Police return
JUL 24 1976 DC (3)
suspects, gu

SUSPECTS

From Page 1B

By CHARLES WILSON

GENEVA — A gun belonging to Waterloo man of Henrietta is being returned to Geneva from Michigan today along with three young persons, two of whom have been charged with murdering Clapp.

Officers from the Waterloo and Canandaigua State Police substations were enroute to Jackson County, Michigan, yesterday and will bring the two murder suspects and their female companion to Seneca County today, Troop E Capt. Richard Boland said.

David R. Jones, 21, of Anderson, S.C., and Kelly D. Greathouse, 16, of San Antonio, Tex., will be arraigned in Waterloo on charged of second-degree murder and grand larceny after their anticipated arrival in Seneca County this evening, Boland said.

Maritea Dienglewicz, 16, also of San Antonio, will be arraigned on a second-degree grand larceny charge in connection with the theft of Clapp's truck, Boland said.

Clapp, 42, a former Brighton police

Turn to Page 2B

ouse took them to a spot where he had buried it near Homer, Mich., before his arrest Wednesday night.

Officer had previously found some ammunition at a motel near Homer, where Greathouse and Ms. Dienglewicz are believed to have stayed before their arrest in a nearby wooded area.

State Police have spent most of this week searching Seneca Lake for Clapp's body, using helicopters, scuba divers, and special television equipment from the U.S. Navy.

The three suspects had been staying at Mauro's Lakeview Tavern-Inn about three weeks before Clapp's disappearance. Clapp had come to Geneva July 15 to do some fishing in his boat which he kept at Roy's Marina on Route 14 south of Geneva, across the road from the Inn.

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Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-7

Suspect in Clapp Case Being Returned

One of two murder suspects wanted for the apparent slaying of a Henrietta man has waived extradition and is expected to leave Jackson, Mich., for New York today.

David R. Jones, 21, of Anderson, S.C., will be arraigned in Seneca County on a charge of second-degree murder, State Police said.

Jones and Kyle E. Greathouse, 16, of San Antonio, Tex., are accused of murdering Wayne H. Clapp, 42, of 30 Garden Parkway, Henrietta, a week ago and dumping the body into Seneca Lake. Clapp is a former Brighton policeman.

JUL 23 1976

The two suspects and Marilea Dienglewicz, 16, who goes by the name of Mrs. Greathouse, were arrested in Michigan Wednesday night after Clapp's stolen pickup truck was found in a park.

Capt. Richard E. Boland, head of State Police detectives in Canandaigua, said there is a technical problem in extraditing the two teenagers. He said that under Michigan law they are considered juveniles but in New York they are considered adults

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-8

2 charged as slayers of Clapp

JUL 25 1976 DC

By CHARLES WILSON

WATERLOO — Two young men were arraigned on second-degree murder charges here last night in connection with the disappearance of Henrietta resident Wayne Clapp.

David R. Jones, 21, of Anderson, S.C. and Kyle E. Greathouse, 16, of San Antonio, Texas, were committed to the Seneca County jail without bail following the 9:30 p.m. arraignment before Waterloo Town Justice Peter Bodine.

The two murder suspects also were arraigned on second degree grand larceny charges along with Marilea Dienglewicz, 16, San Antonio, Texas. She also was committed to Seneca County Jail following the court session.

The three suspects were brought by State Police from Michigan to Seneca County by car yesterday, and arrived at the Waterloo State Police barracks about 7:30 p.m. Fingerprinting and other processing at the State Police substation took an hour and a half. They then were taken to Bodine's office on Main Street for the arraignment.

The three suspects appeared calm during the court session, answering "yes sir" and "no sir" to Bodine's questions as he explained the charges. Seneca County Public Defender Stuart Miller was assigned as counsel for all three. The court proceeding then was adjourned to give the defendants time to obtain their own attorneys.

The three were captured in southern Michigan Wednesday, five days after Clapp, a 42-year-old former Brighton

Turn to Page 2B

CLAPP

From Page 1B

police officer, was last seen leaving Roy's Marina on Seneca Lake south of Geneva to go fishing on his boat.

The grand larceny charge was in connection with the alleged theft of Clapp's truck July 16, the same day as the alleged murder.

Earlier in the evening, Seneca County Dist. Atty. Walter J. Ward said that evidence in the case probably would go to the grand jury which convenes Aug. 2

The charge, as read by Bodine, alleges that the two young men murdered Clapp on Clapp's boat about 7:45 p.m. Police accuse them of shooting Clapp and throwing his body in the lake, then returning in the boat, "Jaws," to Roy's Marina.

Bodine read depositions signed by three witnesses in the case, one of whom said he heard "a series of five or six shots" from the lake saw Clapp's boat veer sharply south.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-9

3 indicted in slaying, theft case

AUG 5 1976 DC

By CAROL RITTER

WATERLOO — While divers yesterday continued to search Seneca Lake for the body of the alleged murder victim, three persons were indicted on a total of 20 counts of murder and other charges.

A Seneca County grand jury returned the indictments against David R. Jones, 21, of Anderson, S.C., Kyle Edwin Greathouse, 16, of San Antonio, Tex., and Marilea Dienglewicz, also 16, of San Antonio.

They were indicted in connection with the July 16 disappearance of Wayne Clapp, 42, of Henrietta.

Clapp, a former Brighton police officer, was reported missing July 19 after he failed to return from a fishing trip to Seneca Lake the previous Friday, July 16.

A manhunt ended in the arrest of the three suspects, who were charged with shooting Clapp with his own gun and throwing his weighted body into the lake.

The indictments accuse Greathouse of five counts of second-degre murder, a Class A felony, claiming he shot Clapp with one or more shots from a .357 magnum Python revolver and attached one or more boat anchors to the body before throwing it into the lake.

Greathouse was also charged with one count of first-degree robbery, a Class B felony, in the theft of a credit card from Clapp while armed with Clapp's gun; three counts of third-degree grand larceny in the theft of Clapp's revolver and keys to his 1973 Ford pickup truck; one count of second-degree grand larceny in the theft of the truck and one count of second-degree criminal possession of a weapon, Clapp's gun.

Jones was charged with three counts of second-degree murder, one of first-degree robbery, three of third-degree grand larceny and one of second-degree grand larceny. He, too, is charged with using anchors to weight Clapp's body, stealing the credit card while armed with the gun and stealing the gun, the keys and the truck.

Marilea Dienglewicz, who also uses the last name of Greathouse, was indicted on one count of second-degree grand larceny in connection with the theft of the truck.

Seneca County Dist. Atty. Walter J. Ward said last night the trio will be arraigned on the indictments at 2 p.m. Thursday in County Court. They are all being held without bail in Seneca

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-10

Seneca jury indicts 3 in slaying case

By CAROL RITTER

WATERLOO — While divers yesterday continued to search Seneca Lake for the body of the alleged murder victim, three persons were indicted on a total of 20 counts of murder and other charges.

A Seneca County grand jury returned the indictments against David R. Jones, 21, of Anderson, S.C., Kyle Edwin Greathouse, 16, of San Antonio, Tex., and Marilea Dienglewicz, also 16, of San Antonio.

They were indicted in connection with the July 16 disappearance of Wayne Clapp, 42, of Henrietta.

Clapp, a former Brighton police officer, was reported missing July 19 after he failed to return from a fishing trip to Seneca Lake the previous Friday, July 16.

A manhunt ended in the arrest of the three suspects, who were charged with shooting Clapp with his own gun and throwing his weighted body into the lake.

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Jones was charged with three counts of second-degree murder, one of first-degree robbery, three of third-degree grand larceny and one of second-degree grand larceny. He, too, is charged with using anchors to weight Clapp's body, stealing the credit card while armed with the gun and stealing the gun, the keys and the truck.

Marilea Dienglewicz, who also uses the last name of Greathouse, was indicted on one count of second-degree grand larceny in connection with the theft of the truck.

Seneca County Dist. Atty. Walter J. Ward said last night the trio will be arraigned on the indictments at 2 p.m. Thursday in County Court. They are all being held without bail in Seneca County Jail.

If the case goes to trial without the body of the alleged victim being found, it will be the first such trial in New York State history, Ward said.

He said he has thoroughly researched the history of murder trials in the state, aided by experts in the Monroe County District Attorney's office and a state agency. No case similar to that pending here has been found in any records, he said.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-11

Memorial service for Clapp is today

The family of Wayne F. Clapp, of Henrietta, a former Brighton policeman believed to have been murdered July 19 at Seneca Lake, is holding a memorial service today.

The service will be at 7 p.m. at the Good Shepherd Church, 3264 East Henrietta Road.

Clapp, 42, of 30 Garden Parkway in Henrietta, is believed by state police to have been murdered while on a fishing trip on Seneca Lake. His body, however, has not yet been found.

David Jones, 21 of South Carolina, and Kyle E. Greathouse, 16, of San Antonio, Tex., were arrested in Michigan July 21 and charged with second degree murder in connection with Clapp's disappearance.

AUG 3 1976 DC

Exhibit B-12

Memorial Rite Slated For Wayne F. Clapp

A memorial service for Wayne F. Clapp of Henrietta, a former Brighton policeman who police believe was murdered and dropped into Seneca Lake, was scheduled for 7 p.m today by his family at Good Shepherd Church, 3264 East Henrietta Rd., Henrietta

Meanwhile, a Seneca County grand jury yesterday returned indictments charging three persons with murder in connection with Clapp's disappearance.

Indicted were David R. Jones, 21, of Anderson, S.C., and Edwin Greathouse, 16, and Marlea Dienglewicz, 16, both of San Antonio, Tex.

Clapp was reported missing July 19 after he failed to return from a fishing trip to Seneca Lake July 16. Divers yesterday continued a search for his body in the lake.

AUG 3 1976 TU

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-13

2 murder case suspects deny guilt in Seneca

AUG 6 1976 DC

By CAROL RITTER

WATERLOO — Kyle Edwin Greathouse and David Ray Jones pleaded innocent yesterday to a total of 19 counts of murder and other charges at their arraignment before Seneca County Judge Daniel De Pasquale here.

"Not guilty, your honor," the 16-year-old Greathouse answered after De Pasquale listed the 11 counts in the lengthy indictment against him — five of second-degree murder, four of grand larceny and one each of robbery and criminal possession of a weapon.

Jones, 21, gave the same response after the judge read the charges in the eight-count indictment against him — three of murder, four of grand larceny and one of robbery.

Jones and Greathouse are accused of killing Wayne V. Clapp, 42, of Henrietta, a former Brighton police officer, on his boat, "Jaws" on Seneca Lake July 16, and dumping the body in the water. Jones is from Anderson, S.C., and Greathouse is from San Antonio, Tex.

Also arraigned yesterday afternoon in the Seneca County Courthouse was Marilea Dienglewicz Greathouse, also 16, of San Antonio, on a single-count indictment charging her with grand larceny in the theft of Clapp's truck from near Roy's Marina south of Geneva on July 16.

She also pleaded innocent and was remanded to the Seneca County Jail without bail along with the two murder suspects.

De Pasquale granted attorneys' request for additional time to file motions in the cases of Jones and Greathouse, extending this period from 45 to 90 days. Seneca County Dist. Atty. Walter J. Ward, who is prosecuting the cases, said he didn't have any objection to such an extension.

Jones is being represented by Public Defender Stuart Miller of Seneca Falls, who requested the extension because of the "complexity of the case," the number of charges and other factors. Greathouse is being represented by Public Defender Thomas Jones of Seneca Falls, who cited the seriousness of the charges, "some novel circumstances" and other factors in his request for more time.

Attorney Jones assured the court that he would file motions in the case as soon as possible.

The 16-year-old San Antonio girl told De Pasquale yesterday that she preferred to be called Mrs. Greathouse rather than Miss Dienglewicz. She is being represetnted by a Seneca Falls lawyer, Calvin Brainard, who was given 45 days to file motions in her case.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-14

AUG 6 1975 DC

(2)

2 plead innocent to murder cha...

By CAROL RITTER

WATERLOO — Kyle Edwin Greathouse and David Ray Jones pleaded innocent yesterday to a total of 19 counts of murder and other charges at their arraignment before Seneca County Judge Daniel De Pasquale here.

"Not guilty, your honor," the 16-year-old Greathouse answered after De Pasquale listed the 11 counts in the lengthy indictment against him — five of second-degree murder, four of grand larceny and one each of robbery and criminal possession of a weapon.

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Jones and Greathouse are accused of killing Wayne V. Clapp, 42, of Henrietta, a former Brighton police officer, on his boat, "Jaws" on Seneca Lake July 16, and dumping the body in the water. Jones is from Anderson, S.C., and Greathouse is from San Antonio, Tex.

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She also pleaded innocent and was remanded to the Seneca County Jail without bail along with the two murder suspects.

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Attorney Jones assured the court that he would file motions in the case as soon as possible.

Greathouse is accused of shooting Clapp one or more times with Clapp's 357 magnum revolver, attaching boat anchors to the body before throwing it in the lake and with taking Clapp's revolver, truck keys and credit card. Jones is accused of using anchors to weight Clapp's body, stealing the credit card while armed with the gun, and taking Clapp's gun, keys and truck.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

Exhibit B-15

2 Plead Innocent

Of Killing Clapp

Kyle E. Greathouse and David R. Jones yesterday pleaded innocent in Seneca County Court in connection with the death of a former Brighton policeman.

Greathouse, 16, of Anderson, S.C. and Jones, 21, of San Antonio, Tex., gave the pleas to Seneca County Judge Daniel DePasquale in Waterloo. They are charged with killing Wayne V. Clapp, 42, of Henrietta, July 16.

Also pleading innocent was Marilea Dienglewicz, 16, of San Antonio, who is charged with grand larceny in connection with the theft of Clapp's truck.

AUG 6 1975

The men are accused of shooting Clapp on Seneca Lake and then dropping his body into the lake.

Exhibit B-16

THE TIMES-UNION Regional

Rochester, N.Y., Friday Evening, Nov. 5, 1976

Murder Defendants Appear in Seneca

By CAROL RITTER

WATERLOO — Proceedings in two pending murder cases were recorded in Seneca County Court yesterday.

A suppression hearing in the case of two youths charged in connection with the July 16 killing of Wayne Clapp, 42, of Henrietta, began yesterday and was to continue at 9 a.m. today.

Defendants Kyle E. Greathouse, 16, of San Antonio, Tex., and David R. Jones, 21, of Anderson, S.C., appeared in court with defense attorneys Thomas Jones and Stuart Miller.

Greathouse and Jones are charged with second-degree murder, first-degree robbery, second-and third-degree grand larceny.

Yesterday's hearing before County Judge Daniel De Pasquale was closed to the press and public when the judge granted a defense motion for a closed hearing. The judge explained that material to be discussed in testimony yesterday might be eventually declared inadmissible as evidence when the case goes to trial.

The defense also asked that witnesses during the supression hearing be kept out of the courtroom so one witness couldn't hear another's testimony. The motion was granted.

Clapp disappeared after he left his Henrietta home for a Seneca Lake fishing trip July 16. A search began three days later when he was reported missing.

The body has never been found, despite long efforts by State Police divers who searched the lake for several weeks after the disappearance.

In a murder case against Daniel Jones, De Pasquale placed the case on a 45-day motion calendar in preparation for trial after Jones pleaded innocent to charges of fatally shooting his mother and three sisters and setting the family home on fire.

Jones, 22, was arrested more than a year ago and charged in connection with the deaths of his mother, Gertrude, 41; and sisters Mary, 17, Theresa, 8, and Sandra, 7.

He was indicted on four counts of second-degree murder and one count of arson, but De Pasquale last fall declared him unable to stand trial

[Exhibit B-16 Continued on Next Page]

Exhibit B-16

after hearings at which three court-appointed psychiatrists testified.

Jones was committed to Mid-Hudson Psychiatric Center near Poughkeepsie for a period of up to a year.

Last Saturday he was returned to the Seneca County Jail and this week he has been observed there by his attorney, Thomas L. Jones.

Jones' lawyer, after conferring yesterday with Seneca County Dist. Atty. Walter J. Ward, waived further competency hearings for his client and stipulated that Daniel Jones could now stand trial. A report from Mid-Hudson recently indicates that Jones is able to undergo a trial now, the judge said.

Jones was arraigned yesterday and pleaded innocent to all counts. He was returned to jail and will remain there until further court action is taken.

Exhibit B-17

The Geneva Times Wed. 11/10/76

Judge reserves decision on show cause order

By BILL ALDEN

WATERLOO — Judge Daniel DePasquale reserved decision yesterday in Seneca County Court on a motion from District Attorney Walter J. Ward to dismiss a show cause order presented by Gannett Inc. (publishers of Democrat and Chronicle and Times Union). The order argued that the transcript of a Greathouse-Jones suppression hearing last Thursday should be made public.

Gannett was represented by lawyer Robert T. Bernius who said he was prepared to argue that the newpaper company suffered irreparable harm by not being able to report what was said at the pre-trial hearing involving Kyle E. Greathouse 16, of San Antonio, Texas, and David R. Jones, 21, of Anderson, S.C., who are accused of murdering Wayne V. Clapp in Seneca Lake last July.

Bernius cited two other cases involving the New York Times and the Gannett Newspaper Co. where the presiding judge ruled in favor of the press' rights to be present at a court hearing.

Ward, accompanied by public defenders Thomas Jones and Stuart Miller, who are representing Jones and Greathouse, asked the judge to dismiss the show cause order because the document was not served on the "office of the defendants" as required in the order. Bernius responded by saying that the requirement was in substance fulfilled when the document was served on the defendants attorneys Monday.

The district attorney and the attorneys for the accused spoke in fervent tones and appeared to be incensed during most of the proceedings which lasted about an hour [illegible]erday morning.

The county attorneys also argued that since Gannett was not a party in the Clapp murder case, its show cause order was incorrectly captioned "The People versus Kyle Greathouse and David Jones." Bernius said he was appearing as a friend of the court, and

[Exhibit B-17 Continued on Next Page]

Exhibit B-17

that favorable rulings in similar cases was sufficient reason for the judge to at least allow Gannett's arguments to be heard.

DePasquale said he tended to agree with the attorney and that this claim of the press' right to be present during all court proceedings would become more important in the future.

In contrast, Ward argued just as strongly that for the defendants' sake the judge was obliged to close the suppression hearing to protect their right to a fair trial.

The purpose of the hearing last Thursday was to determine whether certain evidence including statements, may be admissible as evidence in the defendant's pending trial. The defense motion for a closed hearing was granted on the basis that some of the material brought out in the hearing might be declared inadmissible in the trial.

Greathouse and Jones face counts of second degree murder, robbery and grand larceny in connection with the July disappearance of Clapp, a former Henrietta police officer. Clapp was reported missing July 19 when he did not return home from a fishing trip July 16 to Seneca Lake. Police allege Clapp was murdered and his body thrown into the lake. Several weeks' search of the lake failed to locate the body.

Greathouse and Jones pleaded innocent to the charges at their arraignments last August and are being held in the county jail.

Order to Show Cause and Petition
Dated November 18, 1976 with Exhibits

[Exhibit C to Petition is Omitted in Printing and appears at pages 4 through 6 of this Appendix]

[Exhibit D to Petition is Omitted in Printing and appears at page 7 of this Appendix]

[Exhibit E to Petition is Omitted in Printing and appears at page 8 of this Appendix]

[Exhibit F to Petition is Omitted in Printing and appears at page 42a of the Appendix to the Petition for a Writ of Certiorari.]

[Exhibit G to Petition is Omitted in Printing and appears at page 9 of this Appendix]

[Exhibit H to Petition is Omitted in Printing and appears at pages 13 through 18 of this Appendix]

APR 28 PAGE - 3

Supreme Court, U. S.
FILED
APR 17 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77–1301

GANNETT CO., INC.,

Petitioner,

–against–

HON. DANIEL A. DePASQUALE,
as Judge of the Seneca County Court, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the State of New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

HON. DANIEL A. DePASQUALE
KYLE EDWIN GREATHOUSE
DAVID RAY JONES
STUART O. MILLER, District Attorney of Seneca County

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Printinghouse Press – Appeals Section – 212-687-0384

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77 - 1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and STUART O. MILLER, as District Attorney of Seneca County,

Respondents.

On Petition for a Writ of Certiorari to the State of New York Court of Appeals

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the New York Court of Appeals and the dissenting opinion are reported at 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977) [Pet. App. p. 2a-20a]. The opinion of the New York Supreme Court, Appellate Division, Fourth Department is reported at 55 A.D.2d 107, 389 N.Y.S.2d 719 (4th Dept. 1976) [Pet. App. p. 21a-28a].

QUESTIONS PRESENTED

1. Is it permissible to exclude the public and press from a pretrial hearing held to suppress statements made by the defendant and physical evidence seized from the defendant where the defendant requests the exclusionary order in an effort to minimize media publicity prior to jury selection?

2. Was it permissible for the Seneca County Court judge to issue such an exclusionary order where: (a) the defendants are out-of-state transients accused of the murder and robbery of a local area resident who is a former police officer with substantial roots in the community; (b) there were no eyewitnesses, other than the defendants, to the alleged crime; (c) the alleged deceased's body has never been recovered; (d) the defendants, having fled the jurisdiction, were arrested in Michigan and returned to the County; (e) one of the defendants is sixteen years of age; (f) the case had continuously generated extensive media publicity throughout the county as well as the surrounding counties; and (g) Seneca County has a population of only approximately 36,000?

3. Does the court's affordance of "an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" which "may be found to outweigh the risks of premature disclosures," comply with the press' due process right of access to such hearings? (43 N.Y.2d supra at 381; Pet. App. p.11a).

4. Does the court's affordance to "the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing" and complete transcripts "when the defendants' interests were not longer in jeopardy" satisfy "any true public interest...consonant with constitutional free press guarantees"? (43 N.Y.2d supra at 381; Pet. App. p. 12a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved, except for the Sixth Amendment, are adequately set forth in the Petition.

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...."

STATEMENT OF THE CASE

The facts, as summarized by the court below, are as follows:

> During the course of pretrial suppression hearings in a highly publicized murder case, the court directed that the evidentiary proceedings be closed to the public, including the press. The closure order was imposed as a means to ensure the defendants' right to a fair trial by forestalling the prejudicial effects of further notoriety. In this article 78 proceeding in the nature of prohibition, the petitioner, a disseminator of news through press and television, claims that the court's action violated First Amendment guarantees and the Sixth Amendment right to a public trial.***

This claim to unrestricted media access to criminal proceedings of public interest stems from an unusual matter locally known as "the Clapp murder case." Wayne Clapp was a former town policeman. He had lived his entire 42 years in the Rochester area and had developed deep ties in the surrounding rural communities. On July 19, 1976, he was reported missing.

According to reports in the news media, including the petitioner's two daily papers and Rochester television station, Clapp had last been seen leaving Roy's Marina accompanied by two unidentified youths. His boat had later been returned laced with bullet holes. But his pickup truck and .357 magnum revolver, along with the two strangers, had vanished. Divers began searching Seneca Lake for Clapp's remains. The body of the deceased, however, was never recovered.

On July 22, the media announced that a nationwide police alert for Clapp's truck had proved successful. Michigan police had spotted the vehicle and, after a three-hour chase requiring helicopters and tracking dogs, they arrested a 16-year-old Texas youth, Kyle Greathouse, and his 21-year-old traveling companion, David Jones. The next day, front page articles revealed that Greathouse, apparently acquiesing to police requests, had led Michigan authorities to the location where he had buried the stolen revolver. The press later reported, without expanding, that the suspects had made admissions or confessions before waiving extradition proceedings and being returned to New York.

A Seneca County Grand Jury returned a lengthy indictment charging the two youths with second degree murder and robbery. On August 6,

petitioner's morning daily reported that the accused "pleaded innocent yesterday *** at their arraignment before Seneca County Court Judge Daniel DePasquale. 'Not guilty, your honor,' the 16-year-old Greathouse answered *** Jones gave the same response."

At the commencement of a pretrial suppression hearing, defense attorneys argued that an unabated buildup of adverse publicity had already jeopardized their clients' ability to receive a fair trial. To minimize the prejudicial effects of further disclosures, they asked that the pretrial proceedings be held in camera. The District Attorney had no objections. In an oral ruling the court concluded that "these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial *** Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for those reasons the court is going to grant both [defendants'] motions." The public, including the petitioner's staff reporter, were removed from the courtroom. The suppression hearing then commenced and continued in camera to its conclusion the next day.

Three days later, counsel for Gannett appeared and asked the County Court to reconsider and vacate its ruling nunc pro tunc. Since the proceeding had already been concluded,

a copy of the hearing transcript was also requested. While finding this intervention untimely, the court accommodated the asserted public interest. It signed Gannett's show cause order directing both the defense and the People to justify withholding the transcripts. The issues were fully briefed, and on November 16, the merits were argued. But the advantages of hindsight and further debate only reinforced the court's initial determination that open suppression hearings, if exposed to notoriety, would have deprived Greathouse and Jones of any meaningful opportunity to receive a fair trial. The court's original finding of "a reasonable probability of prejudice to the defendants" not only justified closure in the first instance but, in the Trial Judge's view, applied with equal force to the request for transcripts as well.

The Appellate Division disagreed and, while trial in the criminal proceeding was still pending, granted the petitioner's renewed request for access to the sealed records.

(43 N.Y.2d supra at 374-376; Pet. App. pp. 2a-5a.)

POINT ONE

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

A. The Decision By The New York Court of Appeals in Gannett v. DePasquale et al, Was Rendered In Accordance With This Court's Decisions And Presents No Substantial Federal Question.

1. The Basis Of The Decision Was Construction Of New York State's Public Policy.

This case does not concern the right of the press to publish free from governmental restraint. No order restraining press publication was issued. No order restraining anyone from speaking to the press was issued. No one was held in contempt. The press was at all times free to publish anything concerning the case of People v. Greathouse and Jones that it unilaterally decided to publish.

However, this case does concern the right of press access to information. As this Court stated in Branzburg v. Hays, 408 U.S. 665, 684-685 (1972)," newsmen ... may be prohibited from attending ... trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." This view was reiterated in Pell v. Procunier, 417 U.S. 817, 837 (1974) when this Court stated: "[t]he Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." See similarily Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). In short, it may be one thing for the government to tell the press that it cannot publish the Pentagon Papers but it is quite another thing for the press to tell the government that it must be given access to the Pentagon Papers so it can publish

them. Cf. New York Times Co. v. United States, 403 U.S., 713, 730 (1971)(concurring opinion of Justices White and Stewart).

Gannett originally took the position, which was upheld by the New York Appellate Division, Fourth Department, that the denial to the press of access to pretrial evidentiary suppression hearings bore the same "heavy presumption against [their] constitutional validity" [Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 558 (1976)] as did "prior restraints" on the press' right to publish information which it already possessed. Gannett no longer takes this "absolutist" position but now states that "the task of the judiciary must be to seek an accommodation" between "[t]he preservation of a defendant's right to an impartial jury" (Pet. Brief p. 11) and the press' right to access. The law of New York State already provides for such an "accommodation."

Gannett incorrectly states the law by asserting that courtrooms are presumptively closed in New York and that the public and press have the burden of justifying their "presence in the courtroom" (Pet. Brief p. 14). The law as stated by the Court of Appeals is that "criminal trials are presumptively open to the public, including the press" (43 N.Y.2d, supra at 376; Pet. App. p.5a). However, this presumption is not absolute. The court maintains its inherent power "to protect the rights of parties and witnesses, and generally to further the administration of justice" (43 N.Y.2d, supra at 377; Pet. App. p.7a). Included therein is the power to close the courtroom to the public and press when the Judge, presiding at a constitutionally mandated evidentiary suppression hearing, is so requested by the defendant, and

when that Judge determines that "press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue" (43 N.Y.2d, supra at 380; Pet. App. p. 10a). Only at that point is the pretrial evidentiary hearing presumptively closed. The burden of going forward then shifts to the public and/or press to show that the public interest "outweigh[s] the risks of premature disclosures" (43 N.Y.2d, supra at 381; Pet. App. p. 11a). If this burden is met, the hearing remains open; if not, then so long as the defendant is in jeopardy the media is granted "access to transcripts redacted to exclude matters ruled inadmissible." Complete transcripts are made available "when the defendants' interests [are] no longer in jeopardy" (43 N.Y.2d, supra at 381; Pet. App. p. 12a).

New York's public policy as so expressed is entirely consistent with this Court's opinions. This Court has never required that a defendant must first allow himself to be prejudiced by media disclosure of inadmissible evidence before he can request the court's protection from such prejudicial disclosures. While the measures described by this Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), may mitigate the effects of the prejudice already done to a defendant by pretrial publicity they are not the only available "measures short of prior restraints on publication tending to blunt the impact of pretrial publicity," Nebraska Press Ass'n v. Stuart, supra at 564.

In a criminal prosecution it is the defendant who has the most at stake. The Sixth Amendment states that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...." If "the accused" decides to forego

his right to a public pretrial evidentiary suppression hearing in order to assure his right to an impartial jury, then that choice should be honored. The public may be curious, the media may be engaged in the business of disseminating "news", but sixteen year old Kyle Edwin Greathouse has been indicted for murder and that charge carries with it a twenty-five year minimum sentence. The Sixth Amendment will be of little avail to Greathouse if he can only invoke its guarantee of a "trial, by an impartial jury" after he has been prejudiced. It is illogical that this Court must require the accused to waive his constitutional right to a "speedy trial" but not permit the accused to waive his constitutional right to a "public trial." No defendant should have to request continuances until the prejudice the media has done him can, perhaps, be dissipated; nor should he be forced to incur the expense, inconvenience, and perhaps loss of witnesses that a 300 mile change of venue would entail.

In the words of Justice Jackson, dissenting in Craig v. Harney, 331 U.S. 367, 394 - 395 (1947):

> Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit.

2. The Basis Of The Decision Below Was Construction Of A State Statute.

The decision by the New York Court of Appeals in the instant case involved the construction of a state statute. Gannett challenged Judge DePasquale's exclusionary order on the grounds that it was

> ...directly contrary to the provisions of Section 4 of the Judiciary law which provides, with certain exceptions here inapplicable, that the "sittings of every court within this state shall be public, and every citizen may freely attend the same" (r33).*

In holding that this statute was constitutional and was not violated by the exclusionary order, the Court of Appeals decision was consistent with the prior decisions in People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) and Matter of United Press Ass'n v. Valente, 308 N.Y 71, 123 N.E.2d 777 (1954) (cited with approval in Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).

It is well settled that if the sole basis for a state court's decision is one of statutory construction, "the case cannot be the subject of either appeal or certiorari." Stern and Gressman, Supreme Court Practice, pp. 86-87 (4th ed. 1969). It is equally clear that this Court is bound by the state court's construction of state statutes except in extreme circumstances. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Winters v. New York, 333 U.S. 507 (1948); Murdock v. City of Memphis, 20 U.S. 590 (1875).

*References preceded by "r" refer to the pagination of the Record in the New York Court of Appeals.

3. The Case Turns Solely Upon An Analysis Of The Particular Facts Involved.

Judge DePasquale determined that unless the public and press were excluded from the hearing as the defendants had requested there was "a reasonable probability of prejudice to the defendant" (r45; Pet. App. p. 37a). This determination turned solely upon the Judge's view of the facts before him. It is well settled that this "Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved", United States v. Johnston, 268 U.S. 220, 227 (1925), cited in Stern and Gressman, Supreme Court Practice, p. 172 (4th ed. 1969).

Gannett was granted a full hearing on the merits before Judge DePasquale and the facts of this case were known and understood by all the parties. In its own petition for a writ of prohibition against Judge DePasquale, Gannett noted that: (1) "the charges and the events preceding them were the subject of great public interest" (r26); and (2) "[i]n addition, the criminal investigation and the Criminal Case were the subject of numerous articles and reports by news media other than those of Petitioner."

Petitioner now argues that even though "the accused" requests closure as a means of ensuring his right to an "impartial jury," this cannot be granted him as "[c]losure may mask a collusion among the participants harmful to the defendant, and of which he is personally unaware." (Pet. Brief p. 9). It is condescending to the defendant and his counsel (as well as to the People and the Court) for Gannett to presume the responsibility of protecting the accused from himself.

The defendant must be permitted to determine his own defense free from interference by well intentioned but perhaps misguided samaritans.

If the defendants had prevailed at the suppression hearing they had a triable defense. The People's case was entirely circumstantial. Three people leave on a boat and two return. There are bullet-holes in the boat but there is no deceased and, except for the defendants, no eyewitness to what had occurred. If they fail at the suppression hearing their defense is almost hopeless. Full confessions by them of what had occurred on the boat as well as the alleged murder weapon itself will be in evidence against them. That Gannett fully understood the importance to the defendants of this pretrial evidentiary hearing is shown by its statement that: "because of the absence of a corpus,...the judicial determination of their admissibility may be determinative of the Criminal Case" (r28).

The defendants' nightmare was to prevail at the suppression hearing and yet they see all the suppressed evidence, broadcasted by the media to the potential venireman of Seneca County, become common knowledge. Or worse be greeted by a newspaper headline and television special announcement to the effect that: "MURDERERS MAY GO FREE BECAUSE POLICE BUNGLED." Such a headline would of course be within the sole discretion of the media.

If the defendant chooses not to run such a risk, but rather requests the prophylactic of closure of the pretrial proceeding "to blunt the impact of pretrial publicity", Nebraska Press Ass'n., supra, at 564 then petitioner and amici note standards that would require that first the

defendant, in open court, demonstrate that: (1) there is a "substantial likelihood" that this potentially inadmissible evidence will prejudice him with potential jurors of the county; and (2) there are no alternatives available other than closure.

Such standards would unfairly discourage defendants from requesting closure. Contrary to Gannett's assertion that the indigent defendants in the instant case were better able than itself to undertake the "financial" burden involved (see Pet. Brief p. 14) it is probably unlikely that a defendant, on trial for murder, will choose to use his limited time, energy and money in confronting the media rather than the State. For fear of antagonizing the press, and thus creating an additional adversary, commentators have cautioned defense counsel to "rarely" request closure of pretrial evidentiary suppression hearings. See Rothblatt, Fair Trial-Free Press: The Recurring Theme, N.Y.L.J. Jan. 27, 1978, p. 1, col. 1, p. 26, col. 2. To place a burden upon the defendant of making - in open court - an evidentiary showing of potential prejudice will probably forever forclose such defense requests.

This case turned solely upon the hearing Judge's analysis of the particular facts. Also to argue as Gannett and amici do that merely because the hearing Judge did not mention the Sheppard measures implies that he did not consider them overlooks both the law and public policy of the State of New York. It overlooks the full hearing granted to Gannett and it also overlooks the pronouncements of this Court. Cf. Smith v. Digmon, __U.S.__ (22 CrL 4150; Jan. 18, 1978).

Change of venue, for example, would be unavailable here as a means of protecting the accused. All applications for change of venue in New York State are made to the Appellate Division and not to the trial court. N.Y Crim. Proc. Law §230.20. Hence the hearing Judge cannot even consider this alternative to closure. Also, the Appellate Division Fourth Department has adopted a rule that motions for changes of venue are considered "premature" if they are made prior to the voir dire of the jury, see People v. Gray, 51 A.D.2d 889, 380 N.Y.S.2d 403 (4th Dept. 1976); People v. Hatch, 46 A.D.2d 721 (4th Dept. 1974); People v. Sekou, 45 A.D.2d 982 (4th Dept. 1974). Therefore, before the option of a change of venue would have ever become available the public pretrial suppression hearing would have been completed and defense counsel's voir dire would have proven unavailing.

POINT TWO

THE CASE IS MOOT

The obvious ground for this Court's denial of Petitioner's petition is that this case is moot. As soon as Greathouse and Jones entered their pleas, to lesser included crimes, in satisfaction of the indictment Gannett was offered the entire transcript of the suppression hearing. At that point the question as to whether Judge DePasquale had exceeded his authority in excluding the public and press from the suppression hearing was mooted.

CONCLUSION

Wherefore, Respondents Respectfully Submit That The Questions Upon Which This Case Depend Are So Insubstantial As Not To Need Further Argument, And Respondents Respectfully Move The Court To Dismiss This Petititon For A Writ Of Certioari Or, In The Alternative, To Grant The Petition For A Writ Of Certiorari And Summarily Affirm The Judgment Entered In The Cause By The Court of Appeals Of New York.

Dated: Seneca Falls, New York
April, 1978

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF OF PETITIONER

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Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the New York Court of Appeals, dated December 19, 1977, are set forth at page 2a of the Appendix to the Petition for a Writ of Certiorari (hereinafter "Cert."), and are reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756. The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department, dated December 17, 1976, is set forth at Cert. 21a and is reported at 55 AD2d 107, 389 N.Y.S.2d 719. The orders of trial court Judge DePasquale, dated November 4, 1976 and November 17, 1976, ejecting the public and press from a suppression hearing and denying access to the transcript thereof, are set forth in the Appendix (hereinafter "A.__") at pages A. 4 and A. 11, and are unreported.

JURISDICTION AND PARTIES

The judgment of the New York Court of Appeals was entered on December 19, 1977. A timely motion for reargument was denied on January 12, 1978. Certiorari was granted on May 1, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

Respondents are Hon. Daniel A. DePasquale, County Court Judge of Seneca County, New York; Kyle E. Greathouse; David R. Jones; and Stuart O. Miller, District Attorney of Seneca County, New York. Mr. Miller, at the time of the suppression hearing, was the Public Defender representing David R. Jones, but was thereafter elected District Attorney. He is substituted as a party pursuant to Rule 48 (3) of the Court.

QUESTIONS PRESENTED

1. May the public and press, consistently with the First, Sixth and Fourteenth Amendments to the United States Constitution, be ejected from a traditionally public pretrial suppression hearing when a trial judge believes that publication by the press of truthful statements concerning the hearing might threaten the right of a defendant to an impartial jury?

2. Does an order excluding the public and press from a pretrial suppression hearing, issued without notice, hearing or findings of fact, deprive the press and public of their First and Sixth Amendment rights without due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF THE CASE

Introduction

In mid-July, 1976, Wayne Clapp, a former police officer in a suburb of Rochester, New York disappeared while fishing on Seneca Lake. On July 21, 1976, Respondents Greathouse and Jones were arrested in Michigan and charged with Clapp's murder (A. 24). Following their extradition to New York, Mr. Greathouse and Mr. Jones ("defendants") were indicted for murder in Seneca County, New York (A. 23), approximately forty miles from Rochester. This case arises out of the criminal prosecution of the defendants in Seneca County Court, before Judge Daniel A. DePasquale.

Gannett Co., Inc. ("Gannett") is the publisher of two daily Rochester newspapers, the morning *Democrat & Chronicle* and the evening *Times-Union* (A. 21-22). Gannett reporters were assigned to observe and report on both the murder investigation and the post-arrest proceedings, which the District Attorney and defense attorneys had described as novel and complex because the corpse of the victim had never been found (A. 24).

The Proceedings in the Courts Below

On November 4, 1976, a suppression hearing in the criminal case was scheduled to take place before Judge DePasquale. Among those in the courtroom was Gannett news reporter Carol Ritter (A. 25). At the commencement of the hearing, the attorneys for the defendants moved to eject both the press and the public from the courtroom, asserting only that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial . . . " (A. 4). The prosecutor acquiesced in the request, and the court, with no inquiry into the basis for the attorneys' motion, quickly granted it, stating:

> ". . . these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions." (A. 5-6).

The courtroom was immediately cleared, and the hearing commenced.

No evidence was submitted in support of the closure motion. No further rationale for closure was given, and no countervailing interests were mentioned (A. 4-6).

While the hearing continued, Mrs. Ritter was able to secure the advice of legal counsel. On November 5, 1976, shortly before the hearing ended, she submitted a written request to Judge DePasquale seeking a postponement of the proceeding to allow argument against the ejection. She asserted that the press had a right to attend and that "all due consideration for a fair trial" would be given before publication (A. 7). The request was denied, and the hearing concluded on Friday afternoon, November 5 (A. 8).

On Monday morning, November 8, 1976, counsel for Gannett appeared before Judge DePasquale and moved to vacate *nunc pro tunc* the ejection order and to gain access to the stenographic transcript of the hearing, on the grounds that the order (1) had abridged First and Sixth Amendment rights of the public and press to attend and to disseminate news of the hearing, and (2) had been issued in a procedurally improper manner (Cert. 42a). Argument on the Gannett motion was scheduled for the following day.

On November 9, 1976, the prosecutor and defense attorneys challenged, on procedural grounds, Gannett's right to relief. Gannett was not permitted either to argue orally or to submit legal memoranda concerning the merits of its motion, which was adjourned indefinitely (A. 9-10). Three days later, Judge DePasquale informed the parties that he would permit arguments to be made on November 16, 1976 concerning the validity of the ejection (A. 26).

After argument, Judge DePasquale rejected the Gannett claim, declaring:

> "I do not believe that there are any authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press." (A. 14).

Although counsel for Gannett specifically asked Judge DePasquale to require a "factual showing" as to the necessity for ejection, and "to put on the record why there are no alternative remedies [to ejection] and how the defendants would be prejudiced [by a public hearing]" (A. 16), he did not do so. Judge DePasquale merely indicated that the basis for his order had been "a reasonable probability of prejudice" to the defendants (A. 14, 17). No factual showing of any kind was made.

On November 17, 1976, Judge DePasquale signed an order which denied Gannett's motion and sealed the transcript of the suppression hearing in perpetuity (A. 12). The following day, Gannett sought review of Judge DePasquale's orders in the Appellate Division of the Supreme Court (A. 19). For the first time, newspaper articles which had been published prior to the suppression hearing were offered, by Gannett, into evidence (A.

32-47). On December 17, 1976, that Court unanimously vacated Judge DePasquale's orders. The Court held that those orders transgressed the public's "vital interest in open judicial proceedings, especially criminal proceedings" (Cert. 23a), and constituted a prior restraint on publication in violation of the First Amendment (Cert. 25a).

Before the Appellate Division issued its decision, both defendants pleaded guilty to lesser crimes in satisfaction of the murder indictments pending against them (Cert. 5a).

On appeal, the New York Court of Appeals dismissed the case as technically moot. However, recognizing the importance of the matter, it retained jurisdiction and, voting 4-2, upheld the ejection of the public and press from the courtroom.

While recognizing that judicial proceedings are traditionally open to the public (Cert. 5a), the majority nevertheless declared:

> "... Knowing ... that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt ... we require the Trial Judge to ensure that tainted evidence never see the light of day ..." (Cert. 8a).
>
> "... The extent of the media's right to access should not remain unresolved, for it places in issue the very integrity of our courts."
>
> "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced .... At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." (Cert. 10a).
>
> "... To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest."
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> • • • •

> "... Th[e] level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred out of State." (Cert. 11a-12a).

The dissenters concluded that placing the burden upon the press to demonstrate "an overwhelming interest in keeping all proceedings open" (Cert. 11a) would close the court to the public and press in virtually every newsworthy case. The dissenters would permit the public and press to be barred only in cases of compelling necessity, where other means of preserving a fair trial had been proven ineffective:

> "... Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods ... would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment [citations omitted]." (Cert. 19a).

The Newspaper Articles

Before Judge DePasquale ejected the public and press from the courtroom, Gannett's Rochester newspapers printed a total of 15 articles concerning the Clapp investigation and prosecution (A. 32-47). The articles appeared in the morning *Democrat & Chronicle* and the evening *Times-Union*, and are essentially

duplicative. Thus, on July 20, 1976, both papers announced the disappearance of Clapp (A. 32-33); on July 22, both papers described the arrest of the defendants (A. 34-36); on July 23-24, the defendants' extradition to New York was reported (A. 37-40); and on July 25 the *Democrat & Chronicle* described their arraignment upon return (A. 41). On August 3, 1976 both papers printed the announcement of a memorial service for Clapp and a recitation of the indictment of defendants (A. 42-44), and on August 6, 1976, both papers reported the defendants' arraignment on the indictment (A. 45-47).

After August 6, no news report concerning the criminal case was published for 91 days, until November 5 — *after* Judge DePasquale closed the courtroom (A. 48).

The articles indicate that Wayne Clapp, a former policeman in Brighton, New York (a suburb of Rochester), disappeared while fishing in Seneca County (A. 32). At the time of the disappearance, police asked through the *Times-Union* for help in solving it (A. 24, 33). Two days later, the transient defendants were arrested in Michigan (A. 34). Police described their extradition to New York as presenting a "unique legal question" (A. 38). After defendants' return and indictment for murder, the prosecutor publicly asserted that the case would be the first homicide prosecution in New York State to proceed without the body of the victim (A. 43): Clapp's corpse has never been recovered. Similarly, the Public Defenders representing the defendants described the case as novel and complex (A. 45, 46).

The public interest in the Clapp murder case was typical of its concern with the investigation of any serious crime and the ability of our courts to protect the rights of the public and of the accused. The press coverage reflected that public interest. The news articles were factual and objective, and the press did not attempt to distort or sensationalize the matter.

SUMMARY OF ARGUMENT

Criminal trials and suppression hearings are the mechanisms by which the State formally deprives its individual citizens of their liberty. Criminal courts are thus unlike other public institutions. Their proceedings must be fair, and the community at large must know them to be fair. It is a fundamental tenet of our society that criminal proceedings are to be public events. Public scrutiny of the criminal process, implemented through personal attendance of the press and individual citizens, is simultaneously a safeguard to the criminal accused and the means by which the people are made aware of the enforcement of the criminal law.

The New York Court of Appeals denigrated all public interest in the criminal process as "mere curiosity," and characterized public scrutiny of pretrial hearings as a threat to fair trials. With the purpose of ensuring that testimony at suppression hearings "never sees the light of day," the Court authorized the summary ejection of the public and press from suppression hearings whenever the public, through "press commentary," manifests an interest in those proceedings. The Court of Appeals decision directly affronts basic rights of the public and press secured by the First and Sixth Amendments, and poses an ominous threat to the interests of criminal defendants as well.

Part I of this brief demonstrates that public awareness and press discussion of both criminal trials and suppression hearings lie at the heart of First Amendment objectives. The traditional attendance of the public and press in our courts has resulted in an ongoing flow of information crucial to a democratic society. Closure of courtrooms otherwise open to the public, with the specific intent of interdicting that information flow, is a devastating First Amendment injury and can be justified, if at all, only if those standards set forth in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) are satisfied. The record in this case

demonstrates that no danger to a fair trial existed; effective alternatives to restrictions on First Amendment rights were available to avoid the subjectively perceived danger; and closure orders are inherently incapable of safeguarding the right to a fair trial. The Court of Appeals' "standards," which hinge courtroom secrecy upon the existence of press commentary, and which place the burden upon the press of re-establishing its right to be present in the courtroom, are repugnant to cherished guarantees of free speech and press and give free rein to potentially serious abuses of the right to a fair trial.

In a closely related argument, Part II of the brief demonstrates that the basic values underlying society's need for open trials and the historical development of the Sixth Amendment establish a right of the public to public trials, wholly independent of the similar right secured to criminal defendants. No showing was made sufficient to overcome the public right in this case.

Part III of the brief shows that trial judges must be precluded from conducting secret trials and hearings unless they first afford to those whom they wish to eject adequate notice, an evidentiary hearing, and an opportunity to seek a stay from an appellate court.

ARGUMENT

I

EJECTION OF THE PUBLIC AND PRESS FROM THE SUPPRESSION HEARING VIOLATED THE FIRST AMENDMENT

The trial court ejected the public and press from a suppression hearing solely upon the unsupported request of defense counsel (A.4-6). The New York Court of Appeals sustained that ejection, and held that pretrial evidentiary hearings are presumptively to be closed in New York "[a]t the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue," and may be reopened only if the press can carry the burden of demonstrating a "legitimate public interest" or an "overwhelming interest in keeping all proceedings open." (Cert. 10-11a). Those holdings wholly disregard the requirements of the First Amendment.

A. *The First Amendment protects the flow of information to the public concerning judicial proceedings*

The First Amendment ensures that the public will be sufficiently informed to exercise competently its sovereignty over public institutions.

> "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Its central meaning is to preserve the right of free discussion of the stewardship of public officials (*New York Times Co. v. Sullivan*, 376 U.S. 254, 275 [1964]), which is "the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). *See also* 2 T. Cooley, *Constitutional Limitations* 885-86 (8th Ed. 1927). There is a "paramount public interest in a free flow of information to the people" concerning judges and judicial administration, an interest secured by the ability of the public and

press to attend trials and thereafter to disseminate reports concerning them. *Garrison v. Louisiana, supra,* 379 U.S. at 77.

The press plays a particularly important role with respect to judicial proceedings. It enlightens the public by "report[ing] fully and accurately the proceedings of government." It simultaneously performs the corrective function of "bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). *See also, Maryland v. Baltimore Radio Show,* 338 U.S. 912, 920 (1950) (Frankfurter, J. Opinion on denial of cert.).

Press reports of judges and judicial proceedings are near the "core of the First Amendment" and "clearly serve [] those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." *Landmark Communications, Inc. v. Virginia,* 56 LEd 2d 1, 10-11 (1978). *See also* 1 Z. Chafee, *Government and Mass Communications* 432-33 (1947).

The interrelationship of the press with the criminal justice system is so close as to have been emphasized when tensions between robust reporting and the impartial administration of justice have been the greatest:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. . ." *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966).

Even when conduct of the press demonstrably prejudiced a criminal defendant's interests, this Court nevertheless indicated

"there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 362-63. In short:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 587 (Brennan, J. concurring).

B. *The flow of information to the public concerning pretrial suppression hearings is vital to public understanding of the judicial system*

A pretrial suppression hearing is in many ways the most critical stage of the criminal process for the purposes of the First Amendment. First, the overwhelming majority of criminal prosecutions consist solely of "pretrial" proceedings followed by either dismissals or, as in this case, negotiated pleas of guilty to lesser charges. For example, in New York City during 1976, 89.7% (17,770) of all felony dispositions were made prior to trial, and in the remainder of New York State, 93.4% (5,676) of such dispositions in 1976 were so made. In Seneca County, New York (where this case originated), *100%* of all felony dispositions in 1976,[1] 1975[2] and the latter half of 1974[3] took place without trial.

[1]State of New York, *Twenty-Second Annual Report of the Judicial Conference* 52-55 (1977).

[2]State of New York, *Twenty-First Annual Report of the Judicial Conference* 55 (1976).

[3]State of New York, *Special Six-Month Report of the Judicial Conference* 33 (1975).

Informed public awareness of the criminal justice system thus depends almost entirely upon receipt of information concerning occurrences prior to the selection of a jury.

Moreover, suppression hearings specifically resolve clashes between improper police conduct and the fundamental guarantees of the Bill of Rights.[4] It is there that overreaching searches and electronic surveillances, coerced confessions, suggestive lineups and improper photographic arrays are exposed, and their impact upon defendants and society minimized. A suppression hearing is often the *only* stage in the criminal process in which sworn "testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign . . ." is given. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969) (*en banc*). That testimony should not be given in secret.

The procedural purpose of suppression hearings is to determine whether police activity is sufficiently abhorrent to invoke the exclusionary rule, itself a topic of utmost public interest, misunderstanding and skepticism.[5] Ironically, secret suppression hearings may defeat not only the public interest, but the deterrent purpose of the exclusionary rule itself. As a practical matter, police officers are made aware of suppression of evidence not through written opinions of trial and appellate courts, but by

[4] A criminal defendant in New York, for example, is entitled to a suppression hearing only when affidavits are submitted which demonstrate an unlawful search and seizure, unlawful eavesdropping, involuntarily obtained confession, or tainted identification proceeding. N.Y. Crim. Pro. Law §§ 710.20, 710.60 (McKinney Supp. 1977-78).

[5] The public is familiar with, for example, *Miranda v. Arizona*, 384 U.S. 436 (1966), because it has become symbolic of the maxim that "the criminal goes free, if he must, but it is the law that sets him free" (*Mapp v. Ohio*, 367 U.S. 643, 659 [1961]), a doctrine "viewed with incomprehension by nonlawyers in this country and lawyers, judges and legal scholars the world over." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

personal attendance at suppression hearings or through contemporary news accounts of police conduct which has been deemed improper. Closure of hearings thus renders the educational impact upon police less efficient. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents, supra*, 403 U.S. at 417 (Burger, C.J., dissenting).

Secret hearings also seriously undercut the potential for improvement of police practices. A secret proceeding which results in suppression of evidence can focus public scrutiny solely upon the decision of the judge. Abusive police practices which lead to suppression of evidence may remain unknown to the public and receive little, if any, public attention or corrective pressure. If a secret suppression hearing is followed by release of the accused, it will be easier for police to point to the judge as the "one who let the criminal go free" rather than to accept responsibility for their own misconduct.

A suppression hearing results in findings of fact and legal conclusions by a judge, ideally based upon evidence adduced before him, which may effectively determine the disposition of the entire criminal prosecution. The suppression hearing in the case at bar was typical in that regard. The case undoubtedly would have been dismissed had the defendants' confessions been suppressed, since there was no corpse (A. 43), and there were apparently no eyewitnesses to the crime.

Secret suppression hearings deprive the community of its right to be aware of the basis for critical dispositions in the criminal process rendered without the concurrence of a jury. If such hearings are routinely closed, the public will know only that defendants charged with serious crimes are being set free although they have admitted guilt. Without the opportunity to attend or read news accounts of suppression hearings, the public cannot be expected to understand or accept such results, and increased skepticism of the courts and criminal justice system will result.

The Court of Appeals clearly erred when it described the public interest in this case as "mere curiosity" (Cert. 11a) and held that to "allow public disclosure of potentially tainted evidence . . . is to involve the court itself in the illegality" (Cert. 10a). All of the issues raised by suppression hearings are of the most serious public concern. This case, in which police investigated the apparent murder of an ex-policeman, failed to recover a corpse, and yet prosecuted young, transient and indigent defendants in a small community with which they had no previous connection, is but an example. The public is made aware of those issues not through participation in scholarly debate or review of appellate court opinions, but by reading about them in newspapers and, on occasion, by attending suppression hearings.

The "press commentary" (Cert. 10a) condemned by the Court of Appeals "is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Wood v. Georgia*, 370 U.S. 375, 388 (1962).

C. *Ejection of the public and press from suppression hearings infringes upon First Amendment rights*

Criminal proceedings are the mechanisms by which the State formally restricts the liberty of its citizens. Their central function in society has led them to be fully open to the public and the press.[6]

[6]The Court of Appeals acknowledged that "criminal trials are presumptively open" as are suppression hearings, at least until "press commentary threatens" the impaneling of an impartial jury. Cert. 5a, 10a; *accord*, N.Y. Judiciary Law § 4 (McKinney 1968). Discussion of the history of public trials and suppression hearings appears at p. 35-41 *infra*. The First Amendment implications of courtroom closures are, however, not contingent upon a Sixth Amendment right of the public and press to attend judicial hearings. The First Amendment limits interference by the State, through ejection, with the information flow traditionally linking the judicial process with society.

Public attendance at trials and hearings contemplates the direct exercise of the right of the public to receive information and ideas concerning the criminal justice system. *See generally Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976). An order of ejection interferes with that right, as it does with the right of the press to continue to observe those public events. The right of the press to remain at trials and hearings is "logically antecedent and practically necessary to any effective exercise"[7] of its responsibility to report fully and accurately, and to focus public scrutiny upon, the criminal justice system. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 491-92.

The traditional presence of the press and public at trials and hearings has resulted in an ongoing flow to society of information at the core of the First Amendment. The ejection of the public and press from the courtroom is not an "incidental burdening of the press" — the "consequential, but uncertain, burden on newsgathering" – postulated in the confidential news source cases. *Branzburg v. Hayes, supra*, 408 U.S. at 682, 690. Rather, it is an absolute barrier to an important news source, which directly results in a "significant constriction of the flow of news to the public." *Id.* at 693. Ejection from "courts [where] reporters . . . are always present if they wish to be" (*Estes v. Texas*, 381 U.S. 532, 541-42 [1965]) directly and inevitably

[7]Note, *The Right of the Press to Gather Information*, 71 Col. L.Rev. 838, 843 (1971). In *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972); *id.* at 709 (Powell, J., concurring); *id.* at 723 (Douglas, J., dissenting); *id.* at 727 (Stewart, J. dissenting), a right to gather information, of some dimension, was acknowledged, since "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681; D. Ivester, *The Constitutional Right to Know*, 4 Hast. Const. L.Q. 109, 120-43 (1977); *9 Writings of James Madison* 103 (G. Hunt Ed. 1910). The right to "gather" information may not mandate "a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 46 U.S.L.W. 4830 (June 26, 1978). It is, however, infringed by ejection, with the specific purpose of restricting publication, from a normally public suppression hearing.

"abridges expression that the First Amendment was meant to protect," and diminishes "public access to discussion, debate, and the dissemination of information and ideas" about public affairs. *First National Bank of Boston v. Bellotti*, 55 LEd2d 707, 717, 722 (1978). A challenge by the press and public to their ejection from criminal trials and hearings, therefore, does not involve an attempt to gain unprecedented "access" to places from which they are "regularly excluded,"[8] or to require "openness from the bureaucracy." P. Stewart, *Or of the Press*, 26 Hast. L.J. 631, 636 (1975). And it certainly does not present an assertion by the press or the public of the right to "propagandize . . . views . . . whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48 (1966). This case is simply an attempt to preserve the flow of crucial information to the public.

This Court has on a number of occasions held that the ability to exercise First Amendment rights in a variety of public places is protected. The press and public have traditionally exercised First Amendment functions at trials and hearings. Their presence is compatible with, and indeed necessary to, the continued legitimacy of the process of judicial administration. Where publicly owned areas are "so historically associated with the exercise of First Amendment rights . . . access to them for purposes of exercising such rights cannot be denied absolutely." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 559 (1972). Exclusion from criminal trials and hearings, triggered by press commentary and aimed squarely at publication which lies at the heart of the First Amendment, must comply with First Amendment standards. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Brown v Louisiana*, 383 U.S. 131 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); Note, *The Rights of the Public and the Press to*

[8]Such as grand juries, prisons, conferences of the Court, or meetings in executive session. *Branzburg v. Hayes, supra*, 408 U.S. at 684. *See also Saxbe v. Washington Post*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Houchins v. KQED, Inc., supra*, 46 U.S.L.W. at 4831-33.

Gather Information, 87 Harv. L.Rev. 1505, 1520-21 (1974).

Denials of access to locations in which First Amendment rights were to be exercised have been characterized by the Court as prior restraints; the "Constitution's protection is not limited to direct interference with fundamental rights . . . [The Court is] not free to disregard the practical realities." *Healy v. James*, 408 U.S. 169, 183 (1972). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 US. 546, 552-56 (1975). Here, because of "press commentary" and with the express purpose of ensuring that "tainted evidence never see the light of day" (Cert. 8a) through publication, the Court of Appeals has denied a continued presence at a location necessary to that commentary. The inevitable effect of such action is to attain its intended result — the stifling of all publication of the facts of suppression hearings. As indicated by the dissenters (Cert. 15a) and intermediate appellate court below (Cert. 25a-28a), closure of a courtroom under those circumstances constitutes a prior restraint. *See Bantam Books v. Sullivan*, 372 U.S. 58, 67-71 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936); *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977) (dictum); *United States v. Cianfrani*, 573 F.2d 835, 862 (3d Cir. 1978) (Gibbons, J., concurring); Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L.Rev. 1505, 1517 (1974); G. Fenner, *The Rights of The Press and the Closed Court Criminal Proceeding*, 57 Neb. L.Rev. 442, 460-75 (1978). *But see United States v. Cianfrani, supra*, 573 F.2d at 861; *Gannett Pacific Corporation v. Richardson*, ____Haw.____ (No. 6946, May 26, 1978); *Philadelphia Newspapers, Inc. v. Jerome*, ____Pa.____, 3 Med. L. Rptr. 2185 (April 28, 1978).

Exclusion of the press and public from a courtroom is simply an attempt to achieve the restriction of publication which the Court faced in *Nebraska Press*, without complying with the standards set forth in that case. The holding of *Nebraska Press* will indeed be empty if it may so readily be circumvented by an

unrestricted, albeit creative, interference with a traditionally public news source.

D. *Transcripts cannot substitute for public attendance at trials and hearings*

The Court of Appeals attempted to minimize First Amendment concerns by declaring that "any true public interest [in suppression hearings] could be fully satisfied" (Cert. 12a) by supplying the press with stenographic hearing transcripts. Passing for a moment the definition of "true" public interest,[9] that conclusion is erroneous, for there are no alternatives to attendance which can sustain the flow of information to the public.

First, the Court of Appeals completely ignored the crucial importance of time to the dissemination of news:

> "... [P]ublic interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist." *Bridges v. California*, 314 U.S. 252, 268 (1941).[10]

Delayed publication is likely to be overshadowed by events of the later day and "may be inadequate to emphasize the danger to

[9]This Court has doubted the wisdom of "committing ... to the conscience of judges" the determination of what are "issue[s] of 'general or public interest'" and what are not (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 [1974]), a principle especially relevant where, as here, judges may well be the subject of such interest and scrutiny.

[10]The Court of Appeals denied the legitimacy of the press as a stimulus to the public interest: "Widespread public awareness kindled by media saturation does not legitimize mere curiosity" (Cert. 11a).

public welfare of supposedly wrongful judicial conduct."[11] *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946); *accord, Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 560; *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968); *Wood v. Georgia, supra*, 370 U.S. at 392-93; G. Fenner, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 Neb. L.Rev. 442, 453 (1978). "... [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

Because of the dynamics of the newspaper industry, postponement of publication in theory often means non-publication in practice. A. Friendly and R. Goldfarb, *Crime and Publicity* 195-205 (1967). Suppression hearings accentuate the problem. If, for example, suppression of damaging evidence is followed by a dismissal or acquittal, publishers may fear libel accusations and be reluctant to print any information, including a confession, which tends to imply guilt. *Id.* at 205. In a system of delayed publication, therefore, the public might never know that the exclusionary rule was resulting in dismissals of charges against the guilty, or that the police were coercing confessions from the innocent.

Beyond the injury caused by delay, substitution of transcripts for attendance is inherently inadequate and assures that the full range of information generated at suppression hearings will *never* become known.[12] Crucial tones, inflections, gestures,

[11]Delay in publication may, for example, foreclose a proceeding's potential impact upon elections. Petitioner does not claim that such was the purpose or effect of the orders below, but both County Court Judge and District Attorney are elective offices in New York. Moreover, delay in disclosing the suppression hearing events may retard public pressure to correct police practices, and render impossible public comprehension of either the decision of the court or the plea of guilty which may follow.

[12]At a minimum, the sufficiency of transcripts derives from the fidelity and accuracy of the stenographer, who in New York is appointed and removed at the pleasure of the County Court Judge, subject to Appellate Division approval. N.Y. Judiciary Law § 198 (McKinney Supp. 1977-78).

impatience or inattentiveness — all those qualities of direct observation *(Kleindienst v. Mandel,* 408 U.S. 753, 765 [1972]) which constitute the "atmosphere" of a proceeding — are most unlikely to be recorded by a stenographer. Yet they are a necessary part of the fact-finding process, and are essential to a true comprehension of the trial proceeding, for they may lie at the heart of a subversion of justice.

> "If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called 'news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of 'newsmakers.'" *Branzburg v. Hayes, supra,* 408 U.S. at 729 (Stewart, J., dissenting).

Practical difficulties also make stenographic transcripts inadequate to supplant attendance at trials and hearings. For example, if a suppression hearing results in disposition of the charge, a transcript may not be prepared unless an appeal is taken. Furthermore, ordering transcripts, especially lengthy transcripts, for studied perusal generally will entail payment of a fee which is certain to deter individual members of the public, and very often reporters as well, from seeking such information. The effort involved in gaining access to transcripts filed with a clerk, stenographer, or the court — an inconvenience to the press — will eliminate whole classes of the public from awareness of the proceeding.[13]

Transcripts are untimely, incomplete, "less likely to reach persons not deliberately seeking" the information which they contain and are thus wholly unsatisfactory as an alternative to

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[13] Criminal trials, especially in metropolitan areas, are frequently observed by senior citizens and others — "a casually assembled group from among the unemployed members of the community, who are impelled by a more than average impulse to be present." Radin, *The Right to a Public Trial,* 6 Temple L.Q. 381, 393 (1931). It is unlikely that those courtroom "watchers" would seek out transcripts to review.

personal attendance. *See Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at 771. The effect of their substitution for public proceedings would be to diminish seriously the timely flow of information to the public concerning issues of utmost public interest. *Cf. Nixon v. Warner Communications, Inc.,* 55 LEd 2d 570, 586-87 (1978).

E. *The standards of the court below will make secret judicial proceedings the rule, and public awareness the exception*

The dynamics of the trial process and the standards set forth by the Court of Appeals are such that closure orders, if permitted as a fair trial "remedy" of the first instance, will ever more frequently and commonly be utilized, and will result in the prevalence of secrecy at *all* stages of the criminal process.

Trial judges were sensitized to their affirmative responsibility to secure impartial juries in *Sheppard v. Maxwell, supra.* In response to *Sheppard,* orders restraining the press from publishing information in its possession were fashionable for a time. Since *Nebraska Press,* closure of proceedings has become a most attractive option to trial courts. That it, of all palliatives for pretrial publicity, is simultaneously the most injurious to First Amendment values is of little moment to trial participants, since interference with the flow of information to the public is obscured by more tangible concerns and influences.

For example, defendants, and especially well known or socially prominent defendants, are likely to seek closure not so much to enhance their right to a fair trial, but simply to avoid public scrutiny or notoriety. Defense attorneys may, even if not urged by their clients, frequently request an order of ejection to shield their clients from all publicity, to protect themselves against charges of inadequate representation and, should the request be denied, to create an issue for appeal. Prosecutors, as in this case (A. 5), are likely to consent to the motion simply to avoid a risk of reversal on the grounds of prejudicial publicity.

Judges, too, are averse to reversals on appeal; resisting the combined request of all parties for closure takes extraordinary self-confidence, and at best is unlikely (A. 17). E. Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 Neb. L.Rev. 1, 7 (1977).

Closure of the courtroom is especially attractive to trial judges for additional reasons. It is simple; there are no difficulties in drafting or administering an ejection order. It does not require sanctioning or inconveniencing parties or participants, and does not interfere with the smooth progress of a trial or hearing. It is quick, and does not delay congested court calendars. It is inexpensive. Finally, it is superficially attractive. A judge faced with the urgent, specific demands of litigants will be inclined to consider abstract public scrutiny and awareness of the criminal trial process as an ominous "harm," rather than a fundamental societal good. Trial courts naturally will attempt to mitigate that harm directly by purging its source and, with it, First Amendment freedoms.

F. *The burden of justifying its presence in the courtroom was improperly placed upon the press*

Orders ejecting the press and public from trials and hearings cannot be challenged successfully under the standards articulated by the Court of Appeals. Their attractiveness to trial judges is thereby further enhanced. Apart from the "significant financial disincentives, particularly on the smaller organs of the media" involved in commencing collateral proceedings (*Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 610 [Brennan, J. concurring]),[14] objection would be futile. "Presuming" closure in newsworthy cases, the Court of Appeals has placed the burden

[14] For example, there are 78 daily newspapers and 404 weekly newspapers in New York State alone. Editor and Publisher Co., Inc., *1977 International Yearbook* 21, 285-87 (1977).

upon the press of justifying its continued presence in the courtroom by demonstrating to the trial court an "overwhelming interest in keeping all proceedings open" (Cert. 11a). By assuming that public interest in criminal suppression hearings is not of itself "legitimate," the Court of Appeals created an insurmountable dilemma. The press, ignorant of the facts to be developed at the hearing (A. 16), is nevertheless charged with demonstrating an overwhelming public interest in those facts. That burden of proof, improperly allocated (*Estes v. Texas, supra*, 381 U.S. at 615 [Stewart J., dissenting]; *Speiser v. Randall*, 357 U.S. 513, 525-26 [1958]), is impossible to sustain, and "signal[s] the common, if not certain, locking of the courtroom door virtually whenever requested in pretrial hearings" (Cert. 17a).

G. *The standard established by the Court of Appeals chills protected speech*

Even if ejection is not effected, the press, aware that its commentary about a proceeding will trigger ejection, and fearful of that eventuality, will "feel some inhibition" at disseminating information about criminal investigations and hearings. *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965). That "chilling effect" inflicts certain, albeit immeasurable, injury upon First Amendment interests. *See First National Bank of Boston v. Bellotti, supra*, 55 L Ed 2d at 723 n.21; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

Trial judges, capable of ejecting the press and public from courtrooms when press commentary "threatens" a proceeding, are thus capable of selecting and choosing material which is to be published by the press. That capability is bestowed by the First Amendment upon editors, not judges. *Id.* at 256-58.

The *threat* of closure is being used by judges to impose upon the press the very restrictive orders presented to the Court in *Nebraska Press;* by submitting to such restraints, the press is at

least able to learn what is happening in the public's courts.[15]

The Court of Appeals has permitted ejection of the press from pretrial proceedings as a "remedy" of first resort for undesirable publicity. Its rationale will permit similar ejection from other stages of the criminal process. Press commentary or vigorous public discussion may *always* be perceived as "threatening" to a defendant's right to a fair trial, or even to a fair retrial after possible reversal. If closure is more desirable than *voir dire*, change of venue, sequestration and continuances at the pretrial stage, it is more desirable than such alternatives at the trial stage. In sum, the warning of Professor Emerson is most apt:

> "A system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions. And any such exceptions must be clear-cut, precise, and readily controlled. Otherwise the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule." T. Emerson, *The System of Freedom of Expression* 10 (1970).

See also A. Bickel, *The Morality of Consent* 83 (1975).

H. *Secret proceedings may take place, if at all, only if the requirements set forth in* Nebraska Press *are met*

The lesson of *Sheppard* and *Nebraska Press* is that a trial court, faced with pretrial publicity, can safeguard a defendant's fair trial right by the judicious use of remedial actions which do

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15 ". . . Westchester County Court has barred newsmen from reporting on the pretrial hearings of two men charged with the highly publicized shooting deaths last March of two . . . women. In an interview explaining his order, [the judge] called it a 'different wrinkle' on the decision by the State Court of Appeals * * * *He noted that although his order was based on the decision of the state's highest court, it did not go as far as to exclude newsmen from the courtroom . . . Newsmen covering the trial were admonished to only report names of witnesses but not their testimony, the 'nature of the pretrial proceedings' but not their 'substance'* [emphasis supplied.]" *New York Times*, Jan. 15, 1978, p. 1, col. 8.

not interfere with First Amendment rights. It is submitted that here, where a courtroom was closed in an effort to restrict "press commentary," protections afforded First Amendment interests by *Nebraska Press* should apply. Specifically, ejection of the press and public from trials and suppression hearings to mitigate publicity should be permitted to occur, if at all, only after an evidentiary hearing establishing that (1) publicity presents a clear and present danger to a fair trial; (2) ejection will effectively mitigate or avoid that prejudice; and (3) the prejudice cannot be cured by means less restrictive of the flow of information to the public. *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65. The orders of Judge DePasquale and the judgment of the Court of Appeals satisfy none of those criteria.

1. There was no showing of a danger to a fair trial

Judge DePasquale required no factual showing and made no finding that pretrial publicity would have interfered with the right of defendants to a fair trial. The Court of Appeals followed suit when it sustained Judge DePasquale and instructed trial judges to avoid "any developments that would *threaten* to truncate a defendant's right to a fair trial," and to close pretrial evidentiary hearings when "press commentary . . . would *threaten* the impaneling of a constitutionally impartial jury in the county of venue [emphases supplied]" (Cert. 10a-11a). That holding sets no standard whatsoever, and ignores the principle that restrictions on First Amendment rights cannot be based upon "undifferentiated fear or apprehension." *Tinker v. Des Moines School Dist., supra*, 393 U.S. at 508. "Speculation cannot take over where the proofs fail." *In re Sawyer*, 360 U.S. 622, 628 (1959).

Even assuming that appropriate findings of fact had been made, however, a review of the record (*see Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65; *Edwards v. South Carolina, supra*, 372 U.S. at 233; *Pennekamp v. Florida, supra*, 328 U.S. at 335) will demonstrate that the ejection orders were unjustifiable.

"Pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 554. Here, the publicity most certainly did not create a trial atmosphere remotely similar to those in *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Irvin v. Dowd,* 366 U.S. 717 (1961) or *Rideau v. Louisiana,* 373 U.S. 723 (1963). It consisted solely of "straight news stories," not "invidious articles which would tend to arouse ill will and vindictiveness." *Beck v. Washington,* 369 U.S. 541, 556 (1962). The unbiased nature of the articles made "real differences in the potential for prejudice." *Murphy v. Florida,* 421 U.S. 794, 800 n. 4 (1975); *accord, United States ex rel. Darcy v. Handy,* 351 U.S. 454, 457 (1956); *United States v. Haldeman,* 559 F.2d 31, 61 (D.C. Cir. 1976), *cert. denied,* 97 S. Ct. 2641 (1977). The articles focused upon the investigation of the alleged murder of an ex-policeman, the first murder prosecution in New York State to proceed without a corpse (itself a fascinating concept), and extradition proceedings which were publicly described by authorities as presenting a "unique legal question" (A. 38, 43). The publications were not part of a continuing "crusade" by the press, but appeared contemporaneously with the major events in the developing investigation and prosecution to which they referred. Articles objectively describing the disappearance of the victim, the arrest, the extradition, arraignments, and indictment appeared on only *seven* days of the *eighteen* day period during which those events occurred. The articles then stopped, fully ninety-one days before the commencement of the suppression hearing. *See Stroble v. California,* 343 U.S. 181 (1952). There were no graphic descriptions of prior crimes, confessions, lie detector tests, plea negotiations or other prejudicial topics; nor was there any indication that such publication would occur in the future. In short, the record in this case reflects restrained professional reporting of a serious crime. To sustain courtroom

closure as a first recourse in this case would virtually ensure that the public will be informed about suppression hearings, or about criminal investigations, only at the unbridled discretion of local magistrates.

Nor was the publicity in this case "pervasive." The inference of prejudice from the fact of publication, made by the Court of Appeals, is refuted by the virtually insignificant circulation of the *Democrat & Chronicle* and *Times-Union* in the county of venue. Seneca County's population in 1976 was approximately 36,000. *New York Legislative Manual* 1292 (1975). Yet the daily Seneca County circulation of the *Democrat & Chronicle* at the time was only 1,022, and its Sunday circulation only 1,532; the daily circulation in Seneca County of the *Times-Union* (of which there is no Sunday edition) was 1. American Newspaper Markets, Inc., *Circulation 77/78* 522 (1977). It simply cannot be argued that those circulation figures constitute the type of pervasive publicity which could conceivably interfere with a fair trial. The statistics do, however, demonstrate the ominous threat posed by the reflexive closure of judicial proceedings permitted by the Court below.

2. Ejection orders cannot safeguard the right to a fair trial

The second aspect of the test which must be met before an ejection order may issue is a showing that such an edict will effectively achieve its purpose. Ejection orders, however, are much less likely to assure an impartial jury than were the restraints imposed, and deemed ineffective, in *Nebraska Press Assn. v. Stuart, supra,* 429 U.S. at 565-67.

The Court of Appeals, concerned with the "possible effects of feedback from the community upon the ultimate disposition" of a criminal trial (Cert. 17a), attempted to avoid that feedback by closing the courtroom to the public. There is no doubt that courtroom closure completely interdicts dissemination of ac-

curate information concerning the happenings of judicial proceedings. Yet it is wholly unable to prevent that type of publicity which is most threatening to a defendant's right to an impartial jury. While an ejected press and public cannot know the actual testimony adduced at suppression hearings, they are nevertheless free to speculate as to its content, thus perhaps generating rumors which "could well be more damaging than reasonably accurate news accounts." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 567. Closure orders cannot prevent editorials or inaccurate articles concerning the testimony adduced; they cannot eliminate repetition of previously published prejudicial material; they cannot preclude comment upon the character of the accused, or repetition and emphasis of the fact that a defendant confessed.[16] If the purpose of an ejection order is to lessen public antagonism toward a defendant, it will often be counterproductive, since in itself courtroom closure is exceptionally newsworthy and its coverage in the press may draw more, albeit uninformed, public attention to the suppression hearing than otherwise (see A. 48-51). Ejection of the press can only emphasize the fact that a confession was made or evidence seized, and thus "adversely influence the jury as to the enormity of the crime or unduly impress them as to the importance of the evidence." Note, *Public Trial In Criminal Cases,* 52 Mich. L. Rev. 128, 134 (1953). Finally, the thrust of such orders is to encourage press dissemination of potentially unreliable information, directly contrary to the suggestion of the Court that trial judges should encourage "reporting the case as it unfold[s] in the courtroom — not pieced together from extrajudicial statements." *Sheppard v. Maxwell, supra,* 384 U.S. at 362. Ejection orders are

16 For example, an article entitled "Newsmen Barred at Court Hearing on Scarsdale Death" stated: "At issue in the current hearings is whether statements alleged to have been made by [the defendant], statements that the judge said 'could be characterized as confessions,' will be allowed when the trial starts next week. There are reportedly four separate instances in which the defendant is alleged to have confessed to the killing. . . ." *New York Times,* May 9, 1978, p. 36, col. 1.

therefore inherently ineffective to "prevent the threatened danger." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 562.

3. Remedial measures alternative to ejection of the press and public would clearly have sufficed

This Court has held repeatedly that:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

When a defendant's right to a fair trial has conflicted with the exercise of press freedoms, the Court has applied the "least restrictive means" test and articulated a number of specific measures which do not restrict the flow of information to the public, yet which are "sufficient to guarantee . . . a fair trial." *Sheppard v. Maxwell, supra,* 384 U.S. at 358; *accord, Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563-64, 569; *id.* at 604 (Brennan, J., concurring). This Court has not sanctioned ejection of the public and press from judicial proceedings in even the most egregious situations, since it has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the courtroom is public property' . . . " *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

Similarly, independent study groups have either refrained from endorsing secret pretrial proceedings (Report of the Judicial Conference Committee on the Operation of the Jury System, *"Free Press-Fair Trial" Issue,* 45 F.R.D. 391, 403 [1968]) or have directly recommended against it (Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 10 [1976]; *Report of the Departmental Committee on Proceedings Before Examining Justices,* Cmnd. 479 [1957] at 9, 19).

An American Bar Association study authorizing limited closure, relied upon by the Court of Appeals (Cert. 10a), has been

drastically modified since the decision in *Nebraska Press*, and now successfully accommodates the rights of the press and public with those of a defendant. It authorizes ejection *only* if (1) a clear and present danger to the fairness of a trial would result from dissemination of information from the pretrial proceeding, *and* (2) the prejudice cannot be avoided by alternative means.[17] *ABA Criminal Justice Standards* § 8-3.2 (Tentative Draft 1978); *accord*, Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Free Press-Fair Trial* 21 (Comm. Print 1976); *Gannett Pacific Corporation v. Richardson*, ____ Haw. ____ (No. 6946, May 26, 1978); *Keene Publishing Corp. v. Keene District Court*, ____N.H.____, 380 A.2d 261 (1977); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E. 2d 127 (1976).

The Court of Appeals, however, ignored the decisions of this Court and all interests in open trials when it authorized ejection as a "remedy" of the first instance, speculating that "[c]ontinuance, extensive *voir dire* examinations, limiting instructions or venue changes *may* prove paltry protection for precious rights

17". . . [P]retrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of a jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a . . . pretrial proceeding . . . only if: (i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means." The commentary to the standard lists possible alternatives as: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive *voir dire*, (6) additional peremptory challenges, (7) sequestration, and (8) admonitory instructions to the jury [footnote omitted]."

[emphasis supplied]" (Cert. 10a). The record here demonstrates the emptiness of that declaration.

Ejection in this case was unnecessary since, as in most criminal cases (*see* Notes 1-3 *supra*), no trial took place. Courtroom closures are, moreover, of themselves overbroad since they sweep clearly non-prejudicial matters within their scope. Very frequently, then, First Amendment values will be injured by closures, with no corresponding benefit to a defendant. *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 600-601 (Brennan, J., concurring).

In addition, the press in this case had certainly shown a great deal of sensitivity to the rights of the defendants. While the press has a right, and on occasion the obligation, to be abrasive and provocative, the record in this case emphasizes that press awareness of the needs of the criminal justice system is often significant.[18] *See id.* at 612-613 (Brennan, J., concurring).

Alternatives to restrictions upon First Amendment interests would clearly have avoided any injury to a fair trial in this case. For example, *voir dire* would undoubtedly have been effective. The limited circulation of the Gannett newspapers in Seneca County, together with its large population (p. 29 *supra*), certainly left a "substantial pool" of impartial persons from which a satisfactory jury could have been selected. *See Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 563 n.7.

Similarly, a change of venue, though rejected by the Court of Appeals, would unquestionably have avoided any effects of

18Specific indications of that awareness appear in the article concerning the ejection (which refers to the subject of the suppression hearing not as "confessions" but as "material to be discussed in testimony [which] might be eventually declared inadmissible as evidence when the case goes to trial" [A. 48]), and in the attempt to gain access to the hearing, which specifically acknowledged awareness of the defendant's right to a "fair trial" (A. 7). Voluntary standards reflecting sensitivity to defendants' needs have also been adopted. New York Fair Trial Free Press Conference, *Principles and Guidelines; Rules of Procedure* (1976).

publicity. The population of the counties contiguous to Seneca County is 349,324 and that of the Judicial Department in which Seneca County is located is approximately 3,915,343. *N.Y. Legislative Manual* 1292-93 (1975). Dense population centers were also nearby: Rochester and Syracuse are both approximately 40 miles distant, and Buffalo, New York is approximately 100 miles away.

Restricting the power of trial judges to conduct secret hearings may require creativity and insight on their part, but an accommodation between the interests of a defendant and the press will do more than preserve the right to a fair trial and the right to a free flow to society of critical information. It will avoid the creation of an antagonistic relationship among the press, defendants and the courts, and permit the press to fulfill its ultimate responsibility as the "handmaiden of judicial administration."

II

EJECTION OF THE PUBLIC AND PRESS FROM THE SUPPRESSION HEARING VIOLATED THE SIXTH AMENDMENT RIGHT OF THE PUBLIC TO A PUBLIC TRIAL

The Sixth Amendment guarantees, by its literal terms, the right of a public trial to the "accused."[19] To be sure, a public trial is a very significant right of a criminal defendant, and is derived from a fear that secret proceedings may result in "ruthless disregard of the right . . . to a fair trial." *In re Oliver*, 333 U.S. 257, 270 (1948). Yet the rule against secrecy is equally a right of society at large, for the benefits of public suppression hearings and trials extend far beyond the specific interests of a criminal defendant.

[19]The Due Process Clause of the Fourteenth Amendment guarantees a public trial in state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

> "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake. . . ." *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965).

The Court of Appeals, paying lip service to the need for a "sensitive and wise balancing of the rights of the individual defendant and the interests of the public" (Cert. 7a), nevertheless held that the public's interest in this case was not "legitimate," and authorized a secret proceeding. Petitioner submits that the lower court's holding is impermissible under the Sixth Amendment.

A. *There is a Sixth Amendment right of the public to a public trial*

The public trial provision "is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice' [citation omitted]." *Levine v. United States*, 362 U.S. 610, 616 (1960). That trials were uniformly open to the public at common law is clear,[20] and there is no evidence that the Constitutional Framers, who exhibited a "trend toward popular, non-technical administration of justice" (F. Heller, *The Sixth Amendment* 17 [1951]), and "a genius for studied imprecision" (L. Levy, *Legacy of Suppression* 308 [1960]), intended to limit the right to criminal defendants. Indeed, it is doubtful that at common law the right was ever meant to benefit the accused at all. M. Radin, *The Right to a Public Trial*, 6 Temple L.Q. 381 (1931); *Unites States v. Cianfrani, supra*, 573 F.2d at 853 n.6.

[20]*Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (Ct. App. 1956); *Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 89-93, 123 N.E.2d 777 (1954) (Froessel, J., dissenting); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1965), *app. dism. as moot*, 164 Ohio St. 261, 130 N.E.2d 701 (Ohio 1955); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U.L.Rev. 1138 (1966); Note, *Public Trial in Criminal Cases*, 52 Mich. L.Rev. 128 (1953).

Colonial documents which addressed the concept did not confine its application to defendants. For example, Chapter XXIII of the Charter of Fundamental Laws of 1676 of West Jersey indicated:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner nor in any covert manner* ... [emphasis supplied]." 5 F. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America* 2551 (1909).

The Frame of Government of Pennsylvania similarly declared in 1682 that "all courts shall be open, and justice shall neither be sold, denied nor delayed." *Id.* at 3060.

The Constitutional phrase which guarantees a public trial to "the accused" reflects a concern for the rights of the individual, and an understanding that the interests of a defendant in a fair trial and those of the public in a public trial will generally coincide. They generally do. Yet, this case presents a situation where they may not, and the literal terminology of the Public Trial provision must be evaluated in light of its history and the purposes served by open judicial proceedings.

Publicity of judicial proceedings helps to insure that testimony will be of the highest attainable quality. The presence of an audience, especially at evidentiary hearings when no jury is present, minimizes perjury by stimulating an instinctive disinclination to falsify and a fear of contradiction. Moreover, witnesses previously unknown to parties may hear of a proceeding and come forward to offer important testimony. *In re Oliver, supra,* 333 U.S. at 270; *Tanksley v. United States,* 145 F.2d 58 (9th Cir. 1944); 3 Wigmore, *Evidence* §1834 (Chadbourn Rev. 1976).

Public proceedings stimulate attorneys to perform in a manner closer to the ideal. Public scrutiny has been hailed as ensuring that the work of even the court stenographer is "correct ... in every respect (completeness included)." 6 J. Bentham, *The Rationale of Evidence* 355 (Bowring Ed. 1843). Public scrutiny also serves as "an effective restraint upon possible abuse of judicial power" (*In re Oliver, supra,* 333 U.S. at 270), for:

> "Upon [the judge's] moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur.... Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial....
>
> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks — as cloaks in reality, as checks only in appearance [footnote omitted]." 6 J. Bentham, *The Rationale of Evidence* 355 (Bowring Ed. 1843).

In the same fashion, judges who render unpopular or controversial (but proper) decisions based upon public testimony will be spared that skepticism and calumny which might accrue had their rulings emanated from secret hearings. "[O]ne of the potent means for assuring judges their independence is a free press." *Pennekamp v. Florida, supra,* 328 U.S. at 355 (Frankfurter, J., concurring).

Non-participants have a direct interest in the functioning of the criminal justice system and must be made aware of its administration. The victims of crimes, their families and acquaintances clearly are intimately interested in the outcome of a criminal prosecution. The community directly involved with the perpetrator and with the crime itself is interested as well. Awareness that criminal violations are formally being in-

vestigated and prosecuted encourages resort to the police and courts, reduces tension and lessens impulses toward private retribution. And, as in this case, police investigations often draw upon community knowledge through newspaper appeals for assistance (A. 33).

The community at large, the "final judge of the proper conduct of public business" (*Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 495), also has the need contemporaneously to monitor the performance of its public officials, including judges, prosecutors, police, and public defenders — all of whom are paid with public funds and act upon the lives of its individual members with the full authority of the State. Society's interest includes a general concern that its criminal laws are enforced impartially. Yet more specific concerns abound, and many were directly raised in this case. Do coerced confessions, unreasonable searches, calendar pressures, corruption or incompetence result in improper arrests, lead to the reduction and dismissal of charges against the guilty, or cause the unjust conviction of those who are indeed innocent? Only through continued observation of the courts can such questions be answered. As this Court has stated:

> "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public." *Wood v. Georgia, supra,* 370 U.S. at 391.

In addition, fully open trials and hearings enhance a principal underlying purpose of the criminal law: the "general deterrent" effect. Timely newspaper reports of criminal prosecutions are a particularly important means of educating the public as to the bounds of socially acceptable behavior.

> "[Today a] considerable portion of what we call 'news' is devoted to reports about deviant behavior and its consequences. . . . [Newspaper accounts] constitute one of our main sources of information about the normative outlines of society." K. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* 12 (1966).

Full public awareness of the criminal process also serves, in a positive way, to reaffirm the moral values and conduct of "upright people." R. Hood and R. Sparks, *Key Issues in Criminology* 172-75 (1970).

Open court proceedings educate society by enabling people to understand and accept the decisions of judges which affect the quality and direction of their lives. "Conducting trials behind closed doors might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes." *United States v. Lopez,* 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971). In particular, closed hearings present an appearance of collusion which can quickly generate misgivings as to the court's activities:

> "Secret hearings — though they be scrupulously fair in reality — are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States v. Cianfrani, supra,* 573 F.2d at 851.

Accord, Note, *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 169-70 (1976); *cf. Buckley v. Valeo,* 424 U.S. 1, 67 (1976).

The very legitimacy of our judicial system depends upon the public's ability to accept and understand it.[21] The Court recognized the importance of open proceedings when it observed that:

> "we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal

---

[21] "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy . . ." 3 Wigmore, *Evidence* § 1834 (Chadbourn Rev. 1976).

> trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute." *In re Oliver, supra,* 333 U.S. at 266.

That trials must be public was emphatically declared in *Craig v. Harney,* 331 U.S. 367, 374 (1947):

> "A trial is a public event. What transpires in the courtroom is public property . . . [t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

The public trial requirement applies as forcefully to suppression hearings as it does to proceedings following the selection of a jury. Beyond those issues developed heretofore (p. 13 *supra*), suppression hearings have traditionally been part of the trial and are held at the pretrial stage essentially for the convenience of the parties. *Compare Pinto v. Pierce,* 389 U.S. 31, 32 (1967) *with Jackson v. Denno,* 378 U.S. 368 (1964) *and Stein v. New York,* 346 U.S. 156, 172 (1953). A suppression hearing has all the "characteristics of a testimonial hearing, which is the essence of a trial proceeding" (*United States ex rel. Bennett v. Rundle, supra,* 419 F.2d at 605), and falls within the scope of the Public Trial clause:

> ". . . the witnesses were sworn, and they were subject to cross-examination. . . . There was pressure on the government to justify the procedures it used to obtain [evidence] and defeat the suppression motion. And there was pressure on the defendant to obtain suppression of the evidence. Credibility was in issue. The outcome rested upon factual determinations by the trial judge. Except for the necessary absence of the jury and some relaxation in the applicable rules of evidence, the . . . suppression hearing was in form the equivalent of a full trial.
>
> "As such, only by bringing the hearing within the ambit of the public trial provision can the important policies underlying that provision be served." *United States v. Cianfrani, supra,* 573 F.2d at 850.

Accord, United States v. Clark, 475 F.2d 240, 246-47 (2d Cir. 1973); *United States v. Sorrentino,* 175 F.2d 721 (3d Cir.), *cert. denied,* 338 U.S. 868, *reh. denied,* 338 U.S. 896 (1949); *United States v. Lopez, supra,* 328 F. Supp. at 1087; *United States v. American Radiator and Standard San. Corp.,* 274 F. Supp. 790, 794 (W.D.Pa.), *aff'd,* 388 F.2d 201 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968); *cf. Kirby v. Illinois,* 406 U.S. 682, 689-90 (1972).

B. *Parties may not agree to a secret proceeding and thereby defeat the right of the public to a public trial*

"It is important not only that the trial itself be fair, but also that the community at large have confidence in the integrity of the proceeding." *Houchins v. KQED, Inc., supra,* 46 U.S.L.W. at 4839 (Stevens, J., dissenting). Unnecessary closure of trials and hearings to the public will seriously jeopardize both their fairness and the public's confidence in them. It has, accordingly, long been established that the right of the public to a public trial is independent of, and may indeed outweigh, the particular advantages which might accrue to a criminal defendant from secrecy.[22]

---

[22]References in *Estes v. Texas, supra,* 381 U.S. at 538; *id.,* at 583 (Warren, C.J., concurring); *id.* at 588-89 (Harlan, J., concurring) are not to the contrary. In *Estes,* intrusion of television broadcast equipment into a public trial so disrupted the proceeding as to deprive the defendant of due process of law. There was no suggestion that a trial may be *closed* to other than such internally disruptive forces. Indeed, the Court directly intimated the contrary:

> "It is true that the public has the right to be informed as to what occurs in its courts, but reporters . . . are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.* at 541-42.
>
> "So long as the . . . media [are] free to send representatives to trials and to report on those trials . . . there is no abridgment of freedom of the press." *Id.* at 858 (Warren, C.J., concurring).
>
> "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern." *Id.* at 614-15 (Stewart, J., dissenting).

In *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884), Mr. Justice Holmes, quoting from an earlier case, stated:

> "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

See United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949).

The independent right of the public to public trials and suppression hearings is equally as significant as that of a defendant.[23] Any attempt to conduct a secret proceeding must account

[23] *See Phoenix Newspapers Incorporated v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Commercial Printing v. Lee*, 533 S.W.2d 270 (Ark. 1977); *Kirstowsky v. Superior Court, supra; Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968); *State ex rel. Gore Newspaper Company v. Tyson*, 313 So.2d 777 (Fla. App. 4th Dist. 1975), *rev'd on other grnds. English v. McCrary*, 348 So.2d 293 (Fla. 1977); *Gannett Pacific Corporation v. Richardson, supra; Williamson v. Lacy*, 86 Me. 80, 29 A. 943 (1893); *State v. Copp*, 15 N.H. 212, 215 (1844); *State v. Allen, supra*, 73 N.J. at 157-68, 373 A.2d at 389-95 (Pashman, J., concurring); *Lyles v. State*, 330 P.2d 734 (Ct. Cr. App. Okla. 1958); *People v. Hinton*, 31 NY2d 71, 75, 334 N.Y.S.2d 885, 286 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 911 (1973); *Oliver v. Postel*, 30 NY2d 171, 331 N.Y.S.2d 207 (1972); *State ex rel. Dayton Newspapers, Inc. v. Phillips, supra; E. W. Scripps Co. v. Fulton, supra; United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975); *United States v. Sorrentino, supra; U.S. v. Lopez, supra; United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D.N.J. 1971); *United States v. American Radiator and Standard San. Corp., supra; cf. Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916 (1968); *State ex rel. Newspapers, Inc. v. Circuit Court*, 65 Wis.2d 66, 221 N.W.2d 894 (1974). *But see State v. Allen, supra*, 73 N.J. at 169-78, 373 A.2d at 395-400 (Schreiber, J., concurring).

for the public right. For example, a defendant alone cannot, without more, insist upon a secret proceeding:

> "[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial ..." *Singer v. United States*, 380 U.S. 24, 35 (1965) (dictum).

Cf. Levine v. United States, supra, 362 U.S. at 616-17. *But see United States v. Sorrentino, supra*, 175 F.2d at 723. Nor, perforce, can judges and lawyers simply agree among themselves to conduct a secret proceeding, since an essential purpose of a public trial is to scrutinize judges and lawyers to insure that they are properly performing their duties. "Justice cannot survive behind walls of silence." *Sheppard v. Maxwell, supra*, 384 U.S. at 349; *cf. Nebraska Press Assn. v. Stuart*, 427 U.S. 1327, 1333 (1975) (Blackmun, J., Opinion on Reapplication for Stay); 6 J. Bentham, *The Rationale of Evidence* 371 (Bowring ed. 1843).

Portions of trials and hearings have, on occasion and for reasons unrelated to a defendant's right to a fair trial, been held *in camera*. For example, if there is an evidentiary showing that a witness' life would be directly endangered by exposure of his identity, secrecy may be appropriate. *See, e.g., People v. Hinton, supra*, 31 NY2d 71. Those occasions, however, differ greatly from this case, in which the Court of Appeals has permitted defeat of the public interest in a public trial precisely because the public, through "press commentary," manifests that interest. The Constitution requires a much stricter standard. Secret trials and suppression hearings may be had, even if agreed to by all parties, only upon a showing of "strict and inescapable necessity." *United States v. Cianfrani, supra*, 573 F.2d at 854; *accord, United States ex rel. Lloyd v. Vincent, supra*, 520 F.2d at 1274; *United States ex rel. Bennett v. Rundle, supra*, 419 F.2d at 607; Cert. 17a; Cert. 23a-24a.

In situations where the motivating force for closure is a concern over pretrial publicity, First Amendment and Sixth Amendment values overlap. The "strict and inescapable necessity" standard then requires, before suppression hearings and trials may be closed to the public and press, proof that a threat to a fair trial actually exists, that closure will defeat the threat, and that alternatives to secrecy are ineffective. As demonstrated previously (p. 26 *supra*), none of those criteria was met in this case. The ejection orders of Judge DePasquale and the judgment of the Court of Appeals thus violate the Sixth Amendment.

III

ORDERS EJECTING THE PRESS AND PUBLIC FROM JUDICIAL PROCEEDINGS MAY PROPERLY ISSUE ONLY AFTER NOTICE, A HEARING, AND STAY PENDING AN OPPORTUNITY TO SEEK A FURTHER STAY FROM AN APPELLATE COURT

Judge DePasquale ordered the public and press ejected from the courtroom without advance notice and without any evidentiary justification. The hearing concluded before attorneys were permitted to be heard in opposition to the order. The Court of Appeals indicated that such summary exclusion was improper, but did not articulate procedural standards sufficient to guide trial courts in the future (Cert. 11a).

Due process of law precludes such orders from issuing without reasonable notice, an evidentiary hearing, and, unless compelling reasons preclude it, a brief stay pending an opportunity to seek a further stay from an appellate court.

Due process is not a technical notion unrelated to practical circumstances, but calls for such procedural protections as the particular situation may demand. A proper analysis requires an evaluation of the private interests affected, the risk of erroneous deprivation of those rights from inadequate procedures, and the

governmental interest in avoiding additional procedural limitations. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In this case, the First and Sixth Amendment rights of the press and public were irreparably injured: the courtroom was closed and the hearing concluded before any argument could be made in opposition to the ejection order. The countervailing interest in the *procedural* manner in which ejection orders are issued, however, is the state interest in expeditious resolution of criminal charges. A brief delay in a criminal proceeding to afford the public and press an opportunity to be heard in opposition to an ejection order would adversely affect neither that interest of the State, nor the substantive interests of a defendant to a fair and speedy trial.

As this Court stated in *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972):

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' .... It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' ... [citations omitted]."

In ejection situations, notice must be given to the press and public "at a time when the deprivation can still be prevented" (*id.* at 81), and in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ... [or] where conditions do not reasonably permit such notice, [in a manner] not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). If courtroom closure is contemplated because of potentially adverse publicity, notice should properly be given to those media organizations whose publications serve

as the basis for the closure request, and at a time which would permit them to be heard in opposition.

Due process may also require an evidentiary hearing, "depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). When closure of the courtroom to the press and public is contemplated, an evidentiary hearing, adversary in nature, with adequate findings of fact (*Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-64), is required to ensure the proper accommodation of the fundamental interests involved, both at the trial and appellate levels. As the Court indicated in *Carroll v. Princess Anne, supra*, 393 U.S. at 183:

> "The facts ... are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise [footnote omitted]. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication [footnote omitted]."

Finally, due process requires a brief delay in the implementation of ejection orders to afford those adversely affected an opportunity to seek a further stay from an appellate court. Since suppression hearings are typically of short duration, a failure to grant a stay is tantamount to denying the excluded party all relief.

> "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards [citation omitted], including immediate appellate review [citation omitted]. Absent such review, the State must instead allow a stay."

National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977); *accord*, Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2nd Sess., *Free Press-Fair Trial* 21

(Comm. Print 1976); Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 18 (1976).

The injuries suffered by the public and press when secret hearings take place are irreparable, and there is a dangerous potential of such injuries occurring to parties unable to seek vindication. Before the press or public may be excluded from a courtroom, therefore, reasonable notice to those affected must be given; an evidentiary hearing must be held; and an appropriate stay allowed.

CONCLUSION

The New York Court of Appeals perceived "press commentary" concerning pretrial hearings to be a threat to a fair trial. To eliminate that "threat," it has authorized reflexive closure of courtrooms to the press and public. Yet "in the very exercise of the function that provokes the fair trial problem, the press is at the same time serving as the community's most effective instrument for detecting and exposing ... other, more serious enemies of fair trial" (A. Friendly and R. Goldfarb, *Crime and Publicity* 239 [1967]), and secret proceedings themselves pose "inherent dangers to freedom." *In re Oliver, supra*, 333 U.S. at 273. The judgment of the Court of Appeals violates the First, Sixth and Fourteenth Amendments, and should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 77–1301

GANNETT CO., INC.,

Petitioner,

–against–

HON. DANIEL A. DePASQUALE,
as Judge of the Seneca County Court, *et al.*,

Respondents.

On Writ of Certiorari to the
State of New York Court of Appeals

BRIEF FOR THE RESPONDENTS

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner

v.

HON. DANIEL A. DePASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and STUART O. MILLER, as District Attorney of Seneca County,

Respondents.

On Writ of Certiorari to the
State of New York Court of Appeals

BRIEF FOR THE RESPONDENTS

Questions Presented

1. Is it permissible to exclude the public and press from a pretrial hearing on a motion to suppress statements made by the defendant and physical evidence seized from him where the defendant requests the exclusionary order in an effort to minimize publicity prior to jury selection?

2. Was it permissible for the Seneca County Court judge to issue such an exclusionary order where: (a) the defendants were out-of-state transients accused of the murder and robbery of a local area resident who is a former police officer with substantial roots in the community; (b) there were no eyewitnesses to the alleged crime; (c) the alleged deceased's body had never been recovered; (d) the defendants, having fled the jurisdiction, were arrested in Michigan under sensational circumstances and returned to the County; (e) one of the defendants is sixteen years of age; (f) the case had continuously generated extensive publicity throughout the County as well as the surrounding counties; and (g) Seneca County has a population of approximately 36,000?

3. Does the court's affordance of "an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" which "may be found to outweigh the risks of premature disclosures," comply with the public's due process right to access to suppression hearings? (Cert. 11a).

4. Does the court's affordance to "the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing" and complete transcripts

"when the defendants' interests were not longer in jeopardy" satisfy "any true public interest...consonant with constitutional free press guarantees"? (Cert. 11a).

CONSTITUTIONAL PROVISIONS INVOLVED

Except for the Sixth Amendment, the Constitutional provisions involved are adequately set forth in the Petition.

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

STATEMENT OF THE CASE

In mid-July, 1976, former police officer Wayne Clapp was seen leaving a lakeside marina accompanied by two unidentified youths. His boat was later found, laced with bullet holes. His pickup truck and pistol, along with the two strangers, had vanished. Despite a search by divers, Clapp's body was never recovered.

On July 22, 1976 a nationwide police alert for Clapp's truck proved successful when it was spotted by Michigan police. After surrounding a motel and then giving chase for three hours using helicopters and tracking dogs, the defendants were arrested.

Both defendants made statements and Greathouse led Michigan police to the place where he had buried Clapp's gun. They waived extradition proceedings and were returned to New York.

All these facts were reported by the press which serves Seneca County, the scene of the murder.*

The Newspaper Accounts:

Petitioner concedes that the charges and the events preceding the indictments of respondents Kyle Edwin Greathouse and David Ray Jones "were the subject of great public interest" (A23). Petitioner also concedes that "the criminal investigation and the criminal case were the subject of numerous articles and reports by news media other than those of petitioner" (A23).

A "sample" of these "numerous articles and reports" was selected by petitioner and constitutes a portion of the record (A23; 32-51).

The "sample" refers to certain unique legal problems that appeared in the case, i.e. the extradition of Greathouse, a juvenile under Michigan law, and the prospect of prosecuting the indictment without Clapp's body, which has never been recovered (A32-43).

It was reported that State police were in Michigan to interview "suspects in an effort to learn the motive for the apparent slaying" and that "Michigan authorities said Greathouse told them he was afraid he would be shot [by police] (A34)". According to these news articles, defendant Greathouse was "on probation in San Antonio, but officers didn't know details of his

*(A33-35, 37, 41, 45).

criminal record" (A38); the defendants were arrested after Clapp's stolen truck was found (A40); Greathouse led police to Clapp's gun and ammunition was found in his motel (A38-9): a pretrial hearing was scheduled "to determine whether certain evidence, including statements, may be admissible as evidence in the defendant's pending trial" (A51); and that the district attorney "argued...strongly that for the defendant's sake the judge was obliged to close the suppression hearing to protect their right to a fair trial" (A51).

The Motion and the Hearing:

The respondents Greathouse and Jones' motion to suppress statements and physical evidence came on for a hearing before respondent Judge DePasquale. Both defendants moved the court to exclude the public and press prior to taking any testimony. Defendants argued that "we are going to take evidentiary matters into consideration here that may or may not be brought forth at a trial" and that "the dilatorious (sic) effects [of the publication of such evidence] far outweigh the constitutional rights [to a public trial]." Neither the respondent district attorney, nor the reporters and other members of the public who were present objected. The court granted the motion and proceeded in camera (A4-6, 25).

The next day, petitioner's reporter wrote Judge DePasquale requesting either that the suppression hearing "be postponed" so that petitioner could argue its right to be present or "[i]f the hearing has been completed" that petitioner "be given access to the transcript" (A7). Judge DePasquale informed petitioner that the hearing had been concluded, that he had "reserved decision," and that "[u]nder no circumstances ...

will a transcript be made available to you before I have rendered my decision" (A8).

Petitioner then requested that Judge DePasquale vacate nunc pro tunc his decision to hold an in camera suppression hearing and provide "access to the transcript of said hearing immediately upon completion of said transcript" (A1, 11) The court agreed that petitioner had "a right to be heard" and permitted "arguments on the merits to be made." After argument the court rejected petitioner's claim (A9, 26).

Judge DePasquale stated as his reasons for adhering to his initial determination:

> The motion...was granted by the Court on [3] the theory that under the special and unusual circumstances...there was a reasonable probability of of (sic) prejudice to the defendants [had the press and public not been excluded].... (A14)*
>
> I want to very carefully balance the rights of the public to know and the defendant's rights to a fair trial.... (A16).
>
> [T]o say, "Well, let's put the burden on these defendants to show on a factual basis where they are going to be prejudiced," is being unreasonable.... The motion was made... on behalf of the defendants who were facing very serious charges, [9] and as counsel stated, it was a sensitive hearing. With...everything being taken into consideration...the Court ...ruled on the motion, and the basis for its ruling being that there was a reasonable probability of prejudice to the defendants. (A 17).

* See similarly A17, 18.

The Appellate Division:

The Appellate Division reversed Judge DePasquale stating that:

> The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference. (Cert. 25a).

The Court of Appeals:

The Court of Appeals reversed the Appellate Division and held that Judge DePasquale had the power to exclude the public and press from the pretrial evidentiary suppression hearing and that his exercise of that power had not constituted an abuse of discretion (Cert. 10a,11a).

The Court noted that the public has "general interest in the assurance of fair as well as effective enforcement of its laws." Both the defendant and the public have an interest "in an adversary system which consistently dispenses our penal laws impartially... free from needless prejudicial publicity...." However, "where a fair trial may hang suspended in the balances, the Constitution should not be considered as a substitute for a sunshine law.... The public trial concept has therefore 'never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to...protect the rights of parties and witnesses, and generally to further the administration of justice'...."

In all cases where public access is limited, "the remedy-legislative or judicial has called for 'a sensitive and wise balancing of the rights of the individual defendant and the interests of the public'...."

"Having imposed on the Trial Judge an affirmative obligation to ensure this balance..., it would be anomalous indeed to withhold the discretionary power necessary to achieve it." (Cert. 6a-8a).

SUMMARY OF ARGUMENT

This case is not concerned with the use of the drastic power of injunction to restrain press publication, nor with the court's contempt power. It concerns the right of criminal defendants to be tried by a jury which has not been told outside of court about evidence which is inadmissible inside the courtroom.

Respondents Greathouse and Jones moved to exclude the public, including several media representatives, from their pretrial evidentiary suppression hearing on the grounds that the destructive effect of the publication of such evidence far outweighed their constitutional rights to a public trial (A5). The respondent district attorney had no objection and would later argue in behalf of the accused that "the judge was obliged to close the suppression hearing to protect their right to a fair trial" (A51). Respondent Judge DePasquale granted the motion stating later, after full argument on the merits, that "[w]ith ... everything being taken into consideration" (A17) the court "believes that there was a reasonable probability of prejudice to those defendants had the press and public not been excluded" (A15).

This Court has made clear that "our system of law has always endeavored to prevent even the probability of unfairness" (In re Murchison, 349 U.S. 133, 136 (1955)) and has noted that "[p]retrial [publicity] ... may be more harmful than publicity during trial for it may well set the

community opinion as to guilt or innocence." (Estes v. Texas, 381 U.S. 532, 536 (1965)). Accordingly, this Court has reversed tainted convictions, but has emphasized that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." (Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)).

Petitioner claims that, where a Judge denies to the prospective jury (the public) their right to know in advance of trial potentially inadmissible evidence, the "protections afforded First Amendment interests by Nebraska Press should apply." (P.B. 27) Respondents show in Point One that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned" (Cooley, Constitutional Limitations (8th Ed. 1927) at 647); in Point Two that the closing of pretrial proceedings with the consent of the defendant is a "workable compromise, between individual rights 'and the preservation of public rights to Government information'" (Department of Air Force v. Rose, 425 U.S. 352, 381 (1976)); in Point Three that Judge DePasquale's ruling was overwhelmingly justified in the instant case; and in Point Four that petitioner's argument on behalf of the prospective's jury's right to know fails to distinguish restraint of publication from denial of access, and fails to adequately safeguard the right to a fair trial. Respondents conclude that with speech unrestrained and an accused protected from probable harm, the administration of justice has been furthered and the decision of New York Court of Appeals should be affirmed.

POINT ONE

THE RIGHT TO A FAIR TRIAL MUST NOT BE DENIED

A. The Ultimate Concern is the Right to a Fair Trial

In The Right to a Fair Trial, Justice Powell, then President of the American Bar Association, noted that:

> ...we must avoid being confused by generalizations and slogans.... some persons have talked about a "public right to know" as if it were a constitutional right. These generalizations miss the point.... We must bear in mind that the primary purpose of a public trial and of the media's right as part of the public to attend and report what occurs there is to protect the accused.... The ultimate public concern is not the satisfaction of curiosity or an abstract "right to know." Rather it is the assurance that trials are in fact fair and according to law. [fn.1]

To assure "that trials are in fact fair and according to law" this Court has always insisted that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v.

1. Powell, The Right to a Fair Trial, 51 ABAJ 534, 538 (1965).

Colorado, 205 U.S. 454, 462 (1907). To assure that only reliable evidence is presented to the jury, this Court has formulated rules of evidence and procedures "to exclude information that is untrustworthy, irrelevant or unfairly obtained." [fn. 2] See Miranda v. Arizona, 384 U.S. 436 (1966); Jackson v. Denno, 378 U.S. 368 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

Specifically guaranteed to "the accused" by the Sixth Amendment, is "the right to a... trial, by an impartial jury of the State and district wherein the crime shall have been committed." [fn. 3] Accordingly in In re Murchison, 349 U.S. 133, 136 (1955) this Court noted that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.*** [T]o perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14.

2. Ibid. at 534.
3. The foundation for the inclusion of this language in the Sixth Amendment was appropriately New York's proposal to James Madison that the Bill of Rights contain a provision that: "such trial should be speedy, public, and by an impartial jury of the county where the crime was committed." Heller, The Sixth Amendment to the Constitution of the United States, 29 (1969).

Without this specific guarantee of "an impartial jury," all other rights granted by the Fourth, Fifth and Sixth Amendments would be rendered useless.

In Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), this Court clearly stated that the guarantees of the Sixth Amendment are distinctly intended for the protection of "a person who is accused and who is to be tried by petit jury." The guarantee is that a person, accused of a crime but presumed innocent, will receive "due process of law" prior to being "deprived of life, liberty, or property." [fn.4] More specifically, the State cannot lawfully convict any person who has been deprived of his right to an impartial jury. In this regard it is irrelevant "who" actually caused the prejudice. Whether it be done by an agent of the State or a private person, the conviction cannot stand. Turner v. Louisiana, 379 U.S. 466 (1965), Marshall v. United States, 360 U.S. 310 (1959).

However, "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). The State itself has the obligation to prevent its own processes from being used by outsiders to deny an impartial jury. And this Court has agreed that the "[c]ourts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action." Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

In recognition of this State obligation to the accused, the legislative branch has specifically permitted the prosecutor to deny public access to any information that would "deprive a person of a right to a fair trial or an impartial

4. Fifth Amendment, U.S. Constitution.

adjudication." [fn.5]. This principle was recognized by this Court when it stated that "the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as ... any statement made [by the accused] to officials." Sheppard v. Maxwell, supra at 361. Just as the Court has recognized that jurors must be insulated from inadmissible evidence, so it has recognized that potential veniremen must also be protected. This is because:

> Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during trial for it may well set the community opinion as to guilt or innocence. Estes v. Texas, 381 U.S. 532, 536 (1965).

The accused need not wait until his right to an "impartial jury of the State and district" has already been severely damaged by prejudicial pretrial publicity before he may request the court to control its own process, the source of this prejudicial information. The Sheppard judge erred when he held that he "lacked power to control the publicity about the trial" [fn.6].

"While maximum freedom must be allowed the press in carrying on [its] important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness

5. 5 U.S.C.A. §552 b(c)(7)(B) (West Supp. 1977). See Similarly N.Y. Pub. Offic. Law §87 (2)(e)(ii) (McKinney 1978).
6. Sheppard v. Maxwell, supra at 357.

in the judicial process...." "[T]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media...." Estes v. Texas, supra at 539, 540. As this Court has "stressed..., the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." Sheppard v. Maxwell, supra at 358.

B. The Accused's Right to a Fair Trial is Paramount to the Public's Right to a Public Trial

Included within the accused's Sixth Amendment rights is that of a "public trial." This "guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." In re Oliver, 333 U.S. 257, 270 (1948). Accordingly, in Oliver [fn.7] this Court quoted favorably that:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions *** Cooley, Constitutional Limitations (8th Ed. 1927) at 647.

This guarantee of a public trial is "for the benefit of the accused, not the press." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1,5 (1960). Professor Radin, for example, expressly stated that "the Constitution certainly

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7. In re Oliver, supra at 270.

does not mention a public trial as the privilege of the public, but expressly as that of the accused." Radin, The Right to Public Trial, 6 Temple L.Q. 381, 392 (1931). Now "[p]etitioners are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen." United Press Assoc. v. Valente, 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954).

The public has its own interest in keeping its courts open and New York, as well as the rest of the States, recognizes this societal interest. Therefore, it is the law of New York that "... sittings of every court within this state shall be public, and every citizen may freely attend the same." [fn.8]

Accordingly in the instant case the Court of Appeals stated that "[c]riminal trials are presumptively open to the public, including the press" (Cert. 5a). Petitioner concedes that the "Constitutional phrase which guarantees a public trial to 'the accused' reflects a concern for the rights of the individual, and an understanding that the interests of a defendant in a fair trial and those of the public in a public trial will generally coincide." (P.B. 36). What petitioner does not concede is that "when the two rights conflict, the accused's right should be paramount." The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138, 1152 (1966).

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8. N.Y. Judiciary Law §4 (McKinney 1978).

A number of States, including New York, have recognized this potential conflict and have specifically allowed exceptions to the general rule for the benefit of the accused. [fn.9]

Further, "the public trial concept has... never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has been uniformly held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." People v. Jelke, 308 N.Y. 56,

9. E.g. Concerning preliminary hearings, N.Y. Crim. Proc. Law §180.60 (9) (McKinney 1978) provides that: "The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings." Also see: Geise v. United States, 265 F.2d 659 (9th Cir. 1959); 17 Ariz. Rev. S. Rules of Crim. Proc. Rule 9.3 (b) (1977); 4a Ark. S. Crim. Proc. and Rules, §43-615 (1977); Cal. Penal Code §868 (1978); Stapelton v. District Court, 179 Col. Rpts. 187, 499 P.2d 310 (1972); (en banc); 4 Idaho Code, Crim. Proc. §19-811 (1978); Iowa Code §813.2, Rule 2(4)(d) (1978); Commonwealth v. Jackson, ___Mass.____, 327 N.E.2d 912 (1975); Minn. Rules of Crim. Proc., Rule 25.01 (1978); 8 Mont. Rev. S. §95-1202(c) (1977); State v. Simmants, 194 Neb. 783, 236 N.W.2d 794 (1975); 6 Nev. Rev. S. §171.204 (1977); 5a N.D. Cent. Code §29-07-14 (1977); Penn. Rules of Crim. Proc., Rule 323(f) (1978); 8 Utah Code, Crim. Proc. §77-15-13 (1977).

63, 123 N.E.2d 769, 772 (1954); accord United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir. 1975), cert. denied 423 U.S. 937 (1975). Pretrial hearings and portions of trials have been closed to the public and at times such closure has occurred despite the accused's objection that his Sixth Amendment right to a public trial has been infringed. [fn.10]

Petitioner incorrectly asserts that these limited closures have occurred solely "for reasons unrelated to a defendant's right to a fair trial" (P.B. 43). See for example, Kirstowsky v. Superior Court, 143 Cal. App.2d 745, 300 P.2d 163 (Ct. App.

10. See e.g. United States ex rel. Lloyd v. Vincent, supra (to protect disclosure of undercover officer); United States v. Bell, 464 F.2d 667 (2d Cir. 1972), cert. denied 409 U.S. 991 (1972) (skyjack profile testimony); United States ex rel. Bruno v. Herald, 408 F.2d 125 (2d Cir. 1969), cert. denied 397 U.S. 957 (1970); United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom Orlando v. Follette, 384 U.S. 1008 (1965) (to protect threatened witness); United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y. 1974), aff'd 508 F.2d 837 (2d Cir. 1974), cert. denied, 412 U.S. 920 (1975) (to protect emotional and physical health of pregnant witness); People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 296 N.E.2d 265 (1972), cert. denied, 410 U.S. 911 (1973) (to protect disclosure of undercover officer). N.Y.Judiciary Law §4 (McKinney 1978).

1956), where the court approved of a limited exclusion of the public and press from a trial where it appeared that the accused would not be able to testify freely otherwise. It agreed that the trial court's acceptance of the waiver of a public trial could be "a proper exercise of discretion in order to accord the defendant a fair trial." Kirstowsky, supra at 168. In Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83 (Ct. App. 1968), the court noted that "...if the specific text of a confession to a particularly brutal murder had to be discussed in testimony prior to its admission in evidence, the publication of the text might be sufficiently prejudicial to the interest of the defendant to require some sacrifice of the other interests in a public trial by receiving evidence discussing its text in closed proceedings." Oxnard, supra at 93, n. 4.

The "public trial," therefore, is not an absolute right of the public nor of the accused. Courts and legislatures have often exercised their discretion and have balanced the rights of the public, parties and witnesses. Since the general rule is that trials are open, whenever closings have occurred they have been both necessary and of limited duration.

It would be the height of irony if this Court permitted the public to use the accused's constitutional right to a public trial, his personal "safeguard against any attempt to employ our courts as instruments of persecution," [fn.11] to nullify his Constitutional guarantee of a "trial, by an

11. In re Oliver, supra at 270.

impartial jury of the State and District wherein the crime shall have been committed." "To deny the right of waiver [of a public trial] would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused." United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949). As this Court said with reference to the Fifth Amendment in Boyd v. United States, 116 U.S. 616, 635 (1886):

> It may be that it is the obnoxious thing in its mildest and least obnoxious form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

POINT TWO

EXCLUSION OF THE PUBLIC FROM PRETRIAL SUPPRESSION HEARINGS IS CONSTITUTIONALLY PERMISSIBLE

A. Pretrial publication of alleged confessions can endanger the right to a fair trial.

The Court has long recognized that media publicity can irreparably damage an accused's right to a fair trial. See Groppi v. Wisconsin, 400 U.S. 505 (1971); Sheppard v. Maxwell, supra; Estes v. Texas, supra; Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, supra; Janko v. United States, 366 U.S. 716 (1961); Shepherd v. Florida, 341 U.S. 50 (1951) (concurring opinion); Stroble v. California, 343 U.S. 181, 199 (1952) (Frankfurter dissenting); Moore v. Dempsey, 261 U.S. 86, 88 (1923). Pretrial publicity can undoubtedly inflict irreparable damage upon an accused's right to an impartial jury in the county of venue. See Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); Groppi v. Wisconsin, supra; Estes v. Texas, supra; Rideau v. Louisiana, supra.

This Court has also recognized the inherent prejudice involved in media dissemination of confessions untested by constitutional standards as to reliability and admissibility. Rideau v. Louisiana, supra. In Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 254-55 (7th Cir. 1975), cert. denied 427 U.S. 912 (1976), the court after discussing the dissemination of purported confessions concluded "that there is no overriding purpose in allowing such comment and that it could be identified as a presumptively prohibited subject." Cf. Mares v. United States, 383 F.2d 805 (10 Cir. 1967).

In New York the accused must make a motion to suppress a coerced confession or else he has waived his right to a judicial determination of his contention. N.Y. Crim. Proc. Law §710.70(3). Cf. Wainwright v. Sykes 433 U.S. 72 (1977). The hearing on this motion, if it is truly to serve its purpose, must be uninhibited by any extraneous concern that the inadmissible evidence will reach the ultimate trier of fact. Knowing that this hearing will be extensively covered by the media:

> A defendant may feel compelled to give up this right out of fear that inculpatory evidence might become public knowledge before or during trial. Such pressure to forego a constitutional right denies due process. E.g., United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209 (1968).... Even a defendant who chooses to risk such disclosure might be reluctant to testify or present favorable witnesses out of a similar fear of disclosure.
> Philadelphia Newspaper v. Jerome, __Pa.__, 3 Med. L. Rptr. 2185, 2193 (1978).
> Cf. Maryland v. Baltimore Radio Show, 193 Md. 300, 67 A.2d 497, 516-17 (dissenting opinion), cert. denied 338 U.S. 912 (1950).

B. Exclusion is an Effective Prophylactic Measure.

In recognition of the severe damage that pretrial publicity of inadmissible evidence can cause to both an accused and the true administration of justice this Court has specifically endorsed various methods of preventing "the prejudice at its inception." [fn.12] They are: (1) voluntary agreements between the court and the press not to publish

12. Sheppard v. Maxwell, supra at 363.

the potentially inadmissible evidence; (2) requiring that court officers and personnel refrain from extra-judicial comments; and (3) prior restraints on the publication of this prejudicial information. The principle defect in voluntary agreements is that "there is no enforcement procedure." [fn.13] Additionally, as even the press concedes, both the dynamics of their business and their institutional viewpoint oppose any delay in the publication of any information:

> Conditioned as he is by that tradition [to publish], the editor finds it hard to believe that his acts have injured or will injure defendants in general or any defendant in particular.... Friendly and Goldfarb, Crime and Publicity, 200 (1967).

Abstention from extra-judicial comment by court officers and personnel is irrelevant when pretrial testimony itself is the source of the prejudicial information. A prior restraint on publication, which is presumed to be unconstitutional, would also be ineffectual as "once a public hearing had been held, what transpired there could not be subject to prior restraint." Nebraska Press Assn. v. Stuart, supra at 568.

However, this Court has noted an additional prophylactic "tending to blunt the impact of pretrial publicity," namely the "[c]losing of pretrial proceedings with the consent of the defendant." Nebraska Press Assn. v. Stuart, supra at 564. See also Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301,

13. Fair Trial Free Press Principles and Guidelines For the State of New Yor (1976) Appendix, Complaint Procedure (emphasis in original).

1308 (1974). Cf. Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). This alternative, which has been endorsed in a number of states, [fn.14] has also been approved in the ABA Standards Relating to the Administration of Criminal Justice, Pretrial Hearings, §3.1, (Approved Draft 1974) which states in part:

> In any...pretrial hearing...including a motion to suppress evidence, the defendant may move that...the hearing be...closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference.... Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following completion of trial or disposition of the case without trial.

This alternative was adopted by the New York Court of Appeals. The accused's waiver and the court's finding overcome the presumption that the "sittings of every court within this state shall be public" [fn.15] and in turn create a presumption

14. See n. 9, supra.
15. N.Y. Judiciary Law §4 (McKinney 1977).

in favor of closure. The burden of going forward then shifts to the public to show that the public interest "outweigh[s] the risk of premature disclosures" (Cert. 11a). If this burden is met, the hearing remains open; if not, then so long as the defendant is in jeopardy the media is granted "access to transcripts redacted to exclude matters ruled inadmissible" (Cert. 12a). Complete transcripts are made available when the defendants' interests are no longer "in jeopardy" (Cert. 12a).

C. Exclusion Is a Workable Compromise Between Individual and Public Rights

A similar balancing procedure has been adopted by the Congress and by the New York State Legislature [fn.16] in a related situation. The Freedom of Information Act [fn.17] begins with the presumption that public confidence, trust and understanding of government require that the government conduct its business in the open. However, this presumption is not absolute. The Act, of necessity, balances the need for openness with the needs for personal privacy and administrative efficiency. In addition, all information that "would...deprive a person of a right to a fair trial" is specifically declared exempt from disclosure [fn.18]. The government thereby recognized that whatever openness was in its own interest or the public's, "[o]f primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial" (Cert. 11a).

The Act also provides for the closing of meetings to the public. In this regard, it is noteworthy "that deliberations concerning closure or the public announcement of a meeting are by

16. N.Y. Pub. Office Law §§85-90 (McKinney 1978).
17. 5 U.S.C. §552 b (West Supp. 1977).
18. 5 U.S.C.A. §552 b (c)(7)(B) (West Supp. 1977). See also n. 5, supra.

express provision not considered 'meetings' and are therefore not subject to the open meeting requirement of subsection (b)." [fn.19] (This would be similar to an in chambers conference at which the accused could make known his intention to request closure and make whatever offer of proof or argument [fn.20] necessary for the court to decide the motion.) "If the public interest so requires the meeting must be open." [fn.21] Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 492 (1971).

The Act requires that "[f]or each meeting or portion of a meeting which is closed to the public, the agency must maintain a verbatim transcript or electronic recording of the proceeding." [fn.22] "Material which falls within an exemption may be deleted from the record, prior to public disclosure" and "[t]he record, minus exemptible material, must be made available promptly and must be easily accessible to the public." [fn.23].

19. The Government in the Sunshine Act-An Overview, Duke L.J. 565, 584 (1977).
20. In this regard the ABA Standards also reflect the awareness that the accused's argument could itself disclosure the inadmissible evidence. If the accused were to state explicitly in open court all of his reasons for requesting closure it could well defeat the purpose of the motion. Cf. Hoffman v. United States, 341 U.S. 479, 486 (1951) "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."
21. See n. 20, supra at 567, n. 11.
22. See n. 20, supra at 585, citing 5 U.S.C.A. §552 b(f)(1). (West Supp. 1977).
23. See n. 20, supra at 586, citing 5 U.S.C.A. §552 b(f)(2). (West Supp. 1977). Cf. Senate Report 31.

The considerations underlying this requirement are that "verbatim transcripts...assure the public a meaningful remedy if the meeting was improperly closed" and since "certain matters may remain sensitive only temporarily; keeping a verbatim record permits an agency to make the record availilable once the matters are no longer sensitive." [fn.24].

According to Professor Emerson, who expressed approval of the Freedom of Information Act, exceptions to the public's right to know must be formulated. "Many would exist only for a limited time." "Criminal investigations and uncompleted litigation" could well be acceptable categories of such exceptions. [fn.25] This Court has accepted and applied the Act's balancing test, as a "workable compromise, between individual rights 'and the preservation of public rights to Government information.'" Department of Air Force v. Rose, 425 U.S. 352, 381 (1976).

The New York Court of Appeals has adopted a similar "workable compromise" for balancing the accused's right to a fair trial and the public's right to know. Its solution recognizes, as this Court has, that pretrial publicity can irremediably damage an accused's right to an impartial jury in the county of venue. "Without a proper method for dealing with extensive publicity concerning a crime, a judicial system runs the serious risk that the jury will reach its verdict based on evidence from sources outside of the courtroom, contrary to the demands of due process." Philadelphia Newspapers v. Jerome, supra at 2192.

24. See n. 20, supra at 587, citing 5 U.S.C.A. §552b (h)(1) (West Supp. 1977).
25. Emerson, Legal Foundations of the Right to Know, Wash. U.L.Q. 1, 16-17 (1976).

See similarly State v. Allen, 73 N.J. 132, 373 A.2d 377, 395 (Schreiber concurring) (1977). [fn.26].

Balanced against the immediate and severe threat to an accused's right to a fair trial in the county of venue is the right of the public, including potential jurors, to have immediate access to all evidence whether or not it is admissible at trial. In some cases, the public may "have an overwhelming interest in keeping all proceedings open" (Cert. 11a). Where no such interest exists, however, the accused's right to "a constitutionally impartial jury in the county of venue" must take precedence (Cert. 10a).

The limitation on public access to pretrial evidentiary suppression hearings is posited upon the accused's initial request for protection of his Sixth Amendment rights. [fn.27]. The court

26. Commentators have noted that: "An exclusionary order would appear to be most beneficial as to hearings on the admisibility of evidence. The dangers of inadmissible evidence finding its way to a prospective juror would seem to be a sufficient threat to a fair trial to justify the incidental restriction on the access of the media to the information.... This is especially crucial where the evidence in question is an inculpatory statement." Right of Accused To Have Press or Other Media Representatives Excluded From Criminal Trial, 49 ALR 3d 1007, 1014 (1973). Also that Courts "have an obligation to prevent information from reaching [the press], as part of a balance." Kaplan, Free Press/Fair Trial Rights in Conflict: Freedom of The Press and The Rights of the Individual, 29 Okla. L. Rev. 361, 363 (1976).
27. cf. United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (en banc). Court's sua sponte closure of suppression hearing violated accused's right to a public trial. In this context it may be noted that Aaron Burr never requested John Marshall to exclude the public from any pretrial proceeding involving him.

then independently verifies the need for the limitation. The public's right to know is protected by the release of transcripts containing whatever evidence has been found admissible and complete transcripts are made available when the accused is no longer in jeopardy.

D. Exclusion Advances The Public Interest In a Fair and Prompt Criminal Trial.

The closing of pretrial suppression hearings to protect the accused's right to an impartial jury, and the judicial balancing that it entails, is not some newly designed means "to achieve the restriction of publication which the Court faced in Nebraska Press, without complying with the standards set forth in that case" (P.B. 19). See e.g. United States v. American Radiator and Standard San. Corp., 274 F. Supp. 790 (W.D. Pa. 1967). Petitioner erroneously alleges that it is now the routine and automatic procedure in the State of New York. Significantly, petitioner offers no proof in support thereof. On the contrary, this is a procedure which in certain cases can be of great value both to the accused and society. Not only does it protect the accused's right to an impartial jury in the county of venue, but it also protects his right to a speedy trial. As this Court stated in Groppi v. Wisconsin, supra at 510, repeated continuances "work against the important values implicit in the constitutional guarantee of a speedy trial." This procedure also protects the public's interest in effective law enforcement.

> Prejudicial publicity from pretrial suppression hearings injures the Commonwealth as well as the accused. Prejudicial disclosures may taint or require a trial court to delay trial until publicity subsides. Neither

> delayed trials nor retrials present as favorable opportunities for establishing truth as timely first trials. By precluding prejudicial disclosures arising from pretrial suppression hearings, the Rules promote the speedy and effective enforcement of criminal laws, ensure swift convictions deterring crime...and avoid unnecessary expenditures of public funds and judicial resources. Philadelphia Newspapers v. Jerome, supra at 2193.

Further, repeated reversals could well tend to undermine public confidence in the administration of justice, especially if the prejudicial confession is so widely publicized that there is no county that can offer an impartial jury and any trial is thereby rendered impossible. See Irvin v. Dowd, supra.

POINT THREE

EXCLUSION WAS OVERWHELMINGLY JUSTIFIED IN THIS CASE

It is undisputed that there was intensive media publicity concerning the case of People v. Greathouse and Jones (A23). The Appellate Division agreed that the case was "unique" and presented "unusual circumstances" (Cert. 22a). The public was intrigued with runaways from out-of-state, lake draggings, helicopters, tracking dogs, motels surrounded by police, and a murder case where the body of the victim was never found. Here was everything that makes a sensational story and attracts a large reading and television audience. The local news media immediately took full advantage of the opportunity to report this sensational story. At least five of petitioner's self-selected news samples appeared as front page stories (A34, 37, 39, 41, 48).

Petitioner concedes that the criminal prosecution was the "subject of numerous articles and reports by news media other than those of petitioner," but it claims that its two Rochester papers have a "virtually insignificant circulation" in Seneca County (P.B. 29) (Note A21-23). Interestingly, petitioner does not state its Ithaca [fn.28] paper's circulation in Seneca County, nor the number of homes in Seneca County that receive its television broadcasts. "The Geneva Times," a daily paper with a circulation of 17,906 [fn.29] also had a reporter in the courtroom and is published approximately ten miles from the Seneca

28. Ithaca is located less than fifteen miles from Seneca County.
29. Circulation figures are from the 1977 Ayer Directory of Publications (Ayer Press 1977) at p. 602.

County courthouse (A50, 51). The only newspaper published in Seneca County itself is the weekly "Seneca Falls-Waterloo Reveille," circulation 4,172. [fn.30] Other newspapers that are generally circulated in Seneca County are the "Syracuse Post-Standard" and "Syracuse Herald-American," circulation 245,507 and 85,574 respectively [fn.31]; the "Auburn Citizen-Advertiser", circulation 18,387 [fn.32]; and the "Ithaca Journal," circulation 20,218. [fn.33]. These papers were also intensively following the case of People v. Greathouse and Jones. [fn.34].

Throughout Seneca County pseudo-evidentiary facts and theories about the crime and about respondents Greathouse and Jones' guilt had been highly publicized. Petitioner persists in characterizing these unproven, untested, unreliable facts, rumors, and opinions, issued by police agencies and accepted by it without question, as "factual and objective" (P.B. 8). There is a grave danger that potential jurors may also blindly accept these stories as "factual and objective."

The New York practice is to defer the hearing of the "appropriate pretrial suppression motions to the very eve of trial and upon determination immediate commencement of trial." [fn. 35] With trial imminent and the evidentiary suppression hearings about to commence, the media once again

30. Ibid. at p. 662.
31. Ibid. at p. 664.
32. Ibid. at p. 591.
33. Ibid. at p. 607.
34. See e.g., "Syracuse Post Standard" December 15, 1976.
35. N.Y. Crim. Proc. Law §710.40 (Bellacosa, McKinney Supplementary Practice Commentaries 1977 at p. 137).

resumed its publicity of the case [fn.36] (see e.g. A48-51). Several newspapers assigned reporters to cover the suppression hearings (A25). They waited expectantly to hear what the defendants had given the police as their "motive for the apparent slaying" (A 34). They would then report these perhaps coerced confessions to their readers and listeners in Seneca County and in the surrounding counties. If petitioner had not yet broadcast any "confession" (P.B. 28), it was only because it had not yet been given access to the confessions.

This hearing was of overwhelming importance to the two accused. [fn.37] Respondent Greathouse had powerful arguments in support of his suppression motion. When he was taken into custody, the Michigan police already knew that an arrest warrant charging him with murder had been issued and that Greathouse "was afraid he would be shot." (A34, 36) He was a juvenile under Michigan law, far from family and friends. (A36, 38) Yet, the police claimed that almost immediately upon his capture, which was accomplished only after the use of dogs and helicopters, he voluntarily, knowingly and intelligently waived his constitutional right to consult an attorney and his Fifth Amendment privilege against self-incrimination. Greathouse not only "volunteered" a full confession but even led the Michigan police to the murder weapon. The next day he waived his right to oppose extradition.

36. "Although the impact of bad publicity wanes with the passage of time, the memory is easily revived when the trial takes place." Fahringer, Charting a Course From The Free Press To a Fair Trial, 12 Suffolk Univ. L. Rev. 1, 9 (1978).

37. Unless all the "factual and objective" stories that petitioner had circulated were found by the jury to be unproven and unreliable, it is uncertain that "the case undoubtedly would have been dismissed had the defendant's confessions been suppressed" (P.B.15).

Respondent Greathouse later charged that his confession was coerced and moved that it be suppressed. This Court has held that jury consideration of a coerced confession can never be considered "harmless error," Chapman v. California, 386 U.S. 18, 23, (1967); Payne v. Arkansas, 356 U.S. 560, 567-568 (1958). To prevent the jury from hearing this confession during the trial, knowing that they have read or heard of it before trial, is to make a mockery of the claim that "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955).

Judge DePasquale was certainly aware of all the necessary factors when he considered the defendant's motion for closure. He knew the sensational facts of the case and he observed the numerous reporters present in the courtroom. Extensive media publicity had already been generated in relatively small Seneca County (population approximately 36,000). He knew the composition of the County and the cross-section of people who were generally drawn for jury duty (Judge DePasquale is Surrogate, Family Court and County Court Judge of Seneca County (A8)). The public defender argued that the accused would be unable to select an impartial jury if the inadmissible evidence were disseminated by the media, and the district attorney concurred. After full argument on the merits, Judge DePasquale agreed with both the public defender and the district attorney and accordingly adhered to his finding that "[t]here was a reasonable probability of prejudice to those defendants had the press and the public not been excluded" (A15). The considered opinion of the Court, the People, and the public defender, that public awareness of this inadmissible evidence would probably deprive respondents Greathouse and Jones of their constitutional rights cannot be lightly disregarded. Cf. Singer v. United States, 380 U.S. 24, 34-35 (1965).

Even petitioner cannot dispute that the exclusionary order effectively operated here to prevent the threatened harm. All of the other remedies described by this Court in Sheppard v. Maxwell, supra, would only have, perhaps, mitigated the probable damage to these presumptively innocent defendants' constitutional rights. To have allowed this probable damage to occur in the hope that it could, perhaps, be mitigated would have been to involve the court itself in an injustice. Additionally, it must be noted that the effectiveness of the Sheppard remedies has been seriously questioned. [fn. 38] Voir dire is often frustrated by a lack of candor [fn. 39] and it also increases the jurors' exposure to prejudicial statements. Change of venue presumes a demonstrated, unquestioned failure of the voir dire. Instructions and sequestration are of limited value in offsetting the effects of prejudicial pretrial publicity. Reversals, as well as requiring a substantial showing of prejudice, cannot be considered an acceptable alternative.

Judge DePasquale considered these alternatives, but found them to be ineffective under the circumstances of this particular case. He therefore granted the defendants' motion for closure (A16). This exercise of the broad discretion of a trial judge should not be disturbed absent a clear showing of abuse. Cf. Ehrlichman v. Sirica, 419 U.S. 1310 (1974).

38. See e.g. Fahringer, supra at 9-12; Fair Trial/Free Press; The Court's Dilemma, 17 Washburn L.J. 125 (1977).
39. Irvin v. Dowd, supra at 728.

POINT FOUR

EXCLUSION SHOULD BE GRANTED UPON A FINDING THAT PRESS COMMENTARY WOULD THREATEN THE IMPANELLING OF AN IMPARTIAL JURY IN THE COUNTY OF VENUE

Petitioner claims that "there are no alternatives to attendance which can sustain the flow of information to the public" (P.B. 20). Petitioner states that "where a courtroom is closed in an effort to restrict 'press commentary,' protections afforded First Amendment interests by Nebraska Press should apply" (P.B. 27) and petitioner concludes, that any denial of access on less than such a showing" interfere[s] with First Amendment rights" (P.B. 27).

The Nebraska Press criteria should not be applied in this case. They are appropriate where publication of information is restrained, but not where access to information is denied. There is no constitutional obligation to disclose information.

The public and the press have long been excluded from certain judicial and other proceedings, and have been denied access to certain information in the exclusive control of public agencies. The Freedom of Information Acts and Open Meeting Laws discussed supra are examples.

This Court has also rejected claims of a "right to know" under the First Amendment when it has conflicted with Executive Department decisions [fn. 40]. In dictum the claim has been rejected as to grand jury proceedings and Supreme Court

40. Kleindienst v. Mandel, 408 U.S. 753 (1972); Zemel v. Rusk, 381 U.S. 1 (1965).

conferences [fn. 41]. State courts and legislatures have provided for denial of access to court proceedings, both with and without the defendant's consent [fn. 42]. This Court has specifically recognized that the withholding of information is not only permissible, but may well be the most effective means to achieve a legitimate governmental purpose [fn. 43].

Nebraska Press Assn dealt with prior restraints on press publication. The press had already gained access to the prejudicial information and desired to publish it. The court "found only a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." Nebraska Press Assn, supra at 563 (emphasis in original), and enjoined publication. This was impermissible; "the facts [did not] justify the use of the drastic power of injunction," Carroll v. Princess Anne, 393 U.S. 175, 183 (1968). However, in this case the whole question of prior restraint is irrelevant. In closure there is no restraint by the court on the right of the press to publish any prejudicial information that its editors acquire and decide to publish.

41. Branzburg v. Hayes, 408 U.S. 665, 684 (1972). Cf. United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), cert. denied sub. nom. Miami Herald Publishing Co. v. Krentzman, 98 S.Ct. 1606 (1978).
42. See n. 9 and 10, supra. Additionally juvenile court proceedings, adoptions, filiation proceedings etc. are generally closed to the public.
43. Landmark Communications, Inc. v. Virginia, 98 S.Ct. 1535 (1978); Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 496 (1975); cf. Time Inc. v. Firestone, 424 U.S. 448, 454, 457 (1976).

As Justice Frankfurter noted:

> The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. [There is] [t]he duty of a closer analysis and critical judgment.... Kingsley Books, Inc. v. Brown, 354 U.S. 436, 341 (1967).

Closure orders, except for the overruled Fourth Department decision in this case, have never been held to constitute a prior restraint on publication. [fn. 44] Philadelphia Newspapers v. Jerome, supra; State v. Allen, supra (Schreiber

44. State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) is not to the contrary. Although there is dictum in the majority and various dissenting opinions concerning "prior restraints," the case actually turned on an Ohio procedural rule. Where a defendant moves for a change of venue prior to making his suppression motion he has "waived his right to be tried in the locale where the crime was committed ... [and] cannot be heard to complain if his motion is granted." 351 N.E.2d at 133. No such waiver, of course, occurred in the instant case. United States v. Cianfrani, 573 F.2d 835, 858 n. 11 (1977) (3d Cir. 1978) specifically did "not consider whether there might be circumstances where a defendant's Sixth Amendment rights to a fair trial could be so jeopardized by pre-trial disclosure of such information as to permit some limitations on disclosure."

concurring); cf. Oklahoma Publishing Company v. District Court, supra. [fn. 45]

Certainly this Court has never intimated that closure of a courtroom is to be tested by the awesome standard necessary to justify a prior restraint on publication. We agree with Judge Wachtler's comment that this argument "presents a challenge to a fundamental precept of judicial administration - the courts' inherent power to control their own process" (Cert. 5a).

It would indeed be anomalous for this Court to have rejected First Amendment "right to know" claims in other governmental and judicial settings, but allow this same claim where access to possibly inadmissible evidence destructive to a defendant's right to a fair trial is concerned.

This Court has agreed that a judge can draw reasonable conclusions concerning prejudicial pretrial publicity "based on common human experience," as well as that "[h]is conclusion as to the impact of such publicity on prospective jurors [is] of necessity speculative, dealing as he [is] with factors unknown and unknowable." Nebraska Press Assn v. Stuart, supra at 563. However, petitioner demands that this presumably innocent defendant, in an adversarial evidentiary showing in open court (note P.B. 46), establish (among other things) that media publicity of his coerced confession presents a clear and present danger to

45. Note also Litwack, The Doctrine of Prior Restraint, 12 Harv. Civil Rights-Civil Liberties, L.R. 519 (1977); Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955), wherein the authors do not refer to courtroom closure in their discussion of prior restraint.

his right to an impartial jury in the county of venue. [fn. 46] However, care must be taken, lest in discussing the closure motion, the evidence which may be suppressed is described in such detail that the motion is self-defeating. Where the substance of statements or the circumstances of questioning or seizures must be considered, the court should hear this testimony in camera.

The concern is expressed that defense counsel will "frequently request" closure "to protect themselves against charges of inadequate representation" (P.B. 23). The New York Court of Appeals responded adequately to that argument almost twenty-five years ago when it said: "The defense may, it is true, sometimes be inept, but for that there are other remedies than delegating, to persons not directly concerned, the authority to control the course of the proceedings." United Press Assoc. v. Valente, supra at 81.

46. One commentator has remarked that the news media "seem to suggest that surveys should be made by ringing doorbells and asking housewives and others whether they would be prejudiced as jurors if they heard that a defendant in a given case ... had confessed to the crime for which he was being tried." Raichle, If There is an Abridgment of Pretrial Communication, Should it be Coupled with an Expansion of Trial Coverage by Radio and Television, 42 Notre Dame Lawyer, 915, 916 (1967). Such surveys, even if these indigent defendants could have afforded them, and they would have been accepted by the media as "qualified", would only further publicize the precise facts that the accused is seeking to keep temporarily from the community.

Finally, petitioner argues that closure will be rendered ineffective because the media is "nevertheless free to speculate ..., thus perhaps generating rumors which 'could well be more damaging than reasonably accurate news accounts'.... Closure orders cannot prevent editorials or inaccurate articles concerning the testimony adduced...." (P.B. 30).

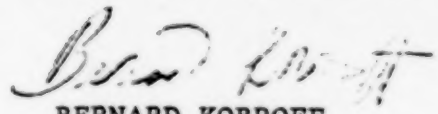
We submit that the question of the existence of a right of access to information is independent of any inability of the press to avoid inaccurate reporting. Since no absolute right of access does exist, the efficacy of closure as a prophylactic measure must be evaluated in each case by the trial court. The possibility of other avenues for prejudicial publicity should not deny the court the option of a closure order. These pessimistic and cynical predictions are themselves speculative, and, in any event, the choice of risks should be left to the accused.

The press' right to publish free from governmental interference is not at stake in this case. Rather, it is the accused's constitutional right to trial by an impartial jury in the county of venue. This right should not be sacrificed in favor of the desire of the public (prospective jurors) to know in advance of trial possibly inadmissible evidence.

CONCLUSION

Justice Black said, "[f]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Bridges v. California, 314 U.S. 252, 260 (1941). Fortunately, this case does not require the choice. Here, speech is unrestrained by court order while the accused's right to an impartial jury in the county of venue has been protected from probable harm. A wise balance has been reached. The administration of justice has been furthered. The decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,



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FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

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1. The American Bar Association standard relied upon by Respondents and the Court of Appeals has been officially modified and now supports the position of Petitioner

In August, 1978, the American Bar Association adopted its new Criminal Justice Standards. Section 8-3.2 provides that pretrial proceedings may be held *in camera* only after a showing that (1) dissemination of information from a public proceeding would create a clear and present danger to the fairness of the

trial and (2) the prejudicial effect of that dissemination cannot be avoided by reasonable means other than closure. *ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press*, §8-3.2 (1978). That approved standard is identical to the draft version set forth in the Brief of Petitioner (Pet. Brief at 32 n. 17). Its predecessor, which more readily sanctioned secrecy and upon which both Respondents (Resp. Brief at 23) and the Court of Appeals (Cert. 10a) relied, has been abandoned.

2. Respondents' belated attempt to find factual justification for the ejection order is not supported by the Record

Respondents assert that ejection of the press and public was "overwhelmingly justified" (Resp. Brief at 30-34). They attempt to support that contention, not by reliance upon the facts of this case, but by vague allusions to matters which are not part of the Record. Ultimately, they hypothesize that "Judge DePasquale was certainly aware of all the necessary factors when he considered the defendant's motion for closure." *Id.* at 33. Respondents' factual argument is untenable.

The Record before this Court shows that Respondents, both at the suppression hearing and in the Appellate Division, took the position that no factual showing was necessary to eject the public and press from pretrial hearings. No newspaper articles or other evidence were submitted to, or considered by, Judge DePasquale when he evicted observers from the courtroom (A. 4-6). When asked by counsel for Gannett to vacate his secrecy order, Judge DePasquale stated that there were no "authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press" (A. 14). Judge DePasquale did not respond when he was requested to describe how the defendants would have been prejudiced by a public hearing, and why alternatives to closure

would have been inadequate to protect their right to a fair trial (A. 16-18). Gannett's commencement of an original proceeding in the Appellate Division gave Respondents still another opportunity to submit proof tending to justify the closure. N.Y. Civ. Prac. Law and Rules § 7804 (McKinney Supp. 1977-78). Again, they did not do so.[1] Instead, Respondents now seek to justify the ejection by reference to irrelevant matters outside the Record.

After the courtroom was closed and Judge DePasquale denied Gannett's motion to reopen it, Gannett placed in the Appellate Division Record the pre-closure newspaper articles which had been published in Rochester's morning *Democrat & Chronicle* and evening *Times-Union*. Respondents' Brief, however, does not limit itself to a discussion of those articles. Apparently recognizing that Gannett's articles did not justify closure, Respondents simply list, for the first time, the total circulation of six other Upstate New York newspapers,[2] but point to only

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[1]Indeed, Respondents' Answers to Gannett's Appellate Division pleadings disclaimed any knowledge of pretrial publicity. Paragraphs 7 and 8 of Gannett's Petition alleged that the criminal case was the subject of great public interest, and that numerous newspaper articles had been written concerning it (A. 23). The Answers of all Respondents denied "any knowledge or information sufficient to form a belief as to the truth" of those allegations. (Answer of Respondent DePasquale at ¶2; Answer of Respondents Greathouse, Jones and Ward at ¶2.)

[2]Respondents' circulation figures are somewhat misleading. The *Ithaca Journal*, to which Respondents attribute a total circulation of 20,218, had a circulation in Seneca County of 638. American Newspaper Markets, Inc., *Circulation 77/78* 522 (1977). The *Geneva Times*, with a total circulation of 17,906, had a Seneca County circulation of 5,704. *Id.* Respondents declare that the circulation of the Syracuse *Post Standard* was 245,507; its circulation in Seneca County, however, was only 755. *Id.* Similarly, the Syracuse *Herald Journal*, although claimed to have a total circulation of 85,574, had a circulation in Seneca County of 1,550. *Id.* Finally, the Auburn *Citizen Advertiser*, with a total circulation in excess of 18,000, was not circulated in Seneca County. *Id.*

one article pertaining to the Clapp case in only *one* of those publications. Although that article was printed five weeks *after* the closure of the hearing,[3] Respondents nevertheless imply that publicity in those other newspapers somehow justified the ejection orders (Resp. Brief at 31). That implication should obviously be disregarded by this Court.

Continuing, Respondents focus on the word "sample" in Gannett's Appellate Division petition (A. 23) to further suggest that prejudicial Rochester newspaper items existed, but were not included by Gannett in the Record (Resp. Brief at 4, 30). Their implication is again unsound. Gannett did not "select" articles favorable to its cause. Every article concerning the Clapp case which had been published in the Rochester papers prior to the closure of the courtroom is contained in the Record before this Court.[4]

The Record in this case and the allegations in Respondents' Brief do no more than show the concern of citizens and the press with the administration of their government — a concern at the "core" of First Amendment objectives.

[3]The article discusses the pleas of guilty to lesser included crimes entered by both defendants in mid-December, 1976 (Resp. Brief at 31 n. 34).

[4]A number of additional articles, dealing with Gannett's legal challenge to the closure orders, were published after the closure, but before the preparation of Gannett's papers in the Appellate Division. Those news reports, which appeared both in the Rochester papers and elsewhere, were (with the exception of A. 48-51) not included by Gannett in the Record. Their existence (and the possible existence of other articles unknown to Gannett) was the reason why the term "sample" was used.

3. Respondents' "factual justification" for the ejection order demonstrates the danger of excessive secrecy occasioned by the opinion of the Court of Appeals

Respondents' visceral allusions to "facts" not in the Record before this Court should be discounted, but not disregarded. They demonstrate the facility with which parties seeking to close hearings, pursuant to the guidelines of the Court of Appeals, can invent a "threat" to a fair trial when none exists. Indeed, the implications of prejudice contained in Respondents' Brief are representative of those unsubstantiated arguments which are being asserted to close courtrooms throughout New York State.[5]

[5]Pet. Brief at 23; *accord*, Brief of New York Times Company as *Amicus Curiae* at 2; *see* Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 5 (1976). *People v. Jacob Thomas*, Ind. No. 77-189, a murder case prosecuted in County Court, Chautauqua County, New York (Adams, J.) is but an example. The following colloquy took place in that case on March 14, 1978:

"[Defense Counsel] . . . [O]n behalf of the defendant, we would move to make this hearing a private hearing, in the sense that the public — including the press — be excluded . . . The main argument that we wish to make is that even though the information which is taken up here would not necessarily and directly be of a substantive nature, the cross examination of witnesses, statements made by them in connection with them, will, of necessity, go into substance, some of which may be inadmissible at the trial; and, in that way, we feel it would prejudice this defendant from getting a fair trial . . .

"[W]e feel that any publicity from this hearing would be prejudicial to the ability to draw a jury and get a fair trial. I would like to quote from Gannett vs DiPasquale [*sic*], . . . there is any possibility that you would be unable to get a panel of veniremen or jurymen for a trial because of what has taken place at a preliminary hearing or a suppression hearing, then such pre-trial evidentiary hearings in this state are presumably to be closed to the public. *It seems as though there is some kind of presumption that a defendant would be entitled to, because we don't know what will come forward in this hearing, and we don't know what will be prejudicial, and if it does come out, there is just nothing that can be done about it*, so we ask

Footnote continued on next page—

Although those closures are seldom reported officially, secrecy is continuing to spread.

For example, Respondents, relying on the logic of the Court of Appeals, advocate that not only the suppression hearing, but the motion for closure itself, should be hidden from public scrutiny.[6]

—Footnote continued from preceding page

> the Court to exercise its discretion now, on behalf of the defendant, and for a fair trial.
>
> . . .
>
> ". . . For you or I to anticipate something, that is impossible, and, therefore, to be sure, and to protect the defendant and to ensure a fair trial which can be reported in every newspaper . . . we would ask that the proceedings be made non-public. . . .
>
> "THE COURT: . . . The precedent has been set by our Court of Appeals. Quoting from the dissent in the Court of Appeals, *'The guidelines expressed by the majority, signal the common, if not certain, locking of the courtroom door, virtually whenever requested, in pre-trial hearings,'* — I have skipped something. 'However, of greater concern is that the majority has turned the burden of proof around.'
>
> "So, I must base my ruling not on what I personally believe is proper, and I am not giving any indication of that, whatever, but only on what *I am bound by, by the highest court of the State of New York.*
>
> . . .
>
> "THE COURT: This case came up through the Fourth Department. The Appellate Division of the Fourth Department was unanimously in agreement with the position stated by the Ogden Newspapers. *The Court of Appeals, by a four to two decision, reversed, and, as pointed out, has shifted the burden of proof to the press to show more than a mere curiosity. In accordance with the request of the defendant, this Courtroom is now cleared to the public.* All the public will leave — members of the press, and all others. There is a provision for redacted transcripts in the case, which I shall follow [emphases supplied]."

[6] "However, care must be taken, lest in discussing the closure motion, the evidence which may be suppressed is described in such detail that the motion is self-defeating. Where the substance of statements or circumstances of questioning or seizures must be considered, the court should hear this testimony in camera." Resp. Brief at 39.

Again, in *Buffalo Courier Express, Inc. v. Stiller*, 62 AD2d 1173 (4th Dept. 1978), a suppression hearing in a Buffalo, New York murder case was ordered closed notwithstanding the fact that two defendants were off-duty Buffalo police officers; the District Attorney had indicated that nothing prejudicial to a fair trial would be introduced at the hearing; and allegations had been made that "members of the Buffalo Police Department attempted to cover up aspects of the . . . death."[7] *See People v. Berkowitz*, 93 Misc 2d 873, 403 N.Y.S.2d 699 (Sup. Ct. Kings 1978) (competency hearing closed).

The opinion below has also been relied upon in contexts distinct from criminal proceedings. For example, in *Quinn v. Aetna Life and Casualty Co.*, ____Misc2d____, 4 Med. L. Rptr. 1049 (Sup. Ct. Queens, 1978), the court held that a cause of action, seeking to enjoin advertisements critical of large jury verdicts in personal injury cases, was viable on the ground that such advertisements interfered with the right of negligence plaintiffs to a fair trial. The advertisements did not relate to any specific civil action, nor was there any civil trial pending or imminent. The parties seeking to enjoin the advertisements were simply plaintiffs in undifferentiated personal injury litigation. The court relied heavily upon the opinion of the Court of Appeals in this case, stating:

> "The rationale of Gannett is very much applicable to the instant action; that is, information which threatens the impaneling of an impartial jury may be restrained despite the First Amendment." *Id.* at 1054.

In conclusion, we do not contend that the public and press have an absolute right to be present during all phases of the judicial process, nor do we question the importance of the right of every accused to be fairly tried before an impartial jury. We say simply that the rights of the press and the public to scrutinize and be informed of criminal trials and hearings — rights secured by the First and Sixth Amendments — are equally as important to our society.

[7] Record at 5-7, *Buffalo Courier Express, Inc. v. Stiller, supra.*

The fears articulated by Respondents in this case are not new. *Reynolds v. United States*, 98 U.S. 145 (1878). Nor are they realistic in "the overwhelming majority of criminal trials." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 551 (1976).

> "There can be no ducking of the problem of the press prejudicing trials even if the occurrence is seldom and is almost solely confined to the *causes célèbres*. But the solutions that we seek must be appropriate to the difficulties, both to their nature and to their frequency. The question is not a matter of neglecting to find a remedy but to find one no more painful than the illness demands." A. Friendly and R. Goldfarb, *Crime and Publicity* 71 (1967).

The "workable compromise" sought by all the parties before this Court is found neither in the opinion of the Court of Appeals nor in the Brief of Respondents. The only "workable compromise" acceptable to a free society is derived from the First and Sixth Amendments. It must ensure that secret judicial proceedings take place, if at all, only as an absolutely last resort. When the courtroom door is closed, "it closes all doors behind it." *Pennekamp v. Florida*, 328 U.S. 331, 350 (1946). The accommodation appropriate to this case was articulated by this Court in *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65.

The judgment below should be reversed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1977

No. 77-1301

Gannett Co., Inc.,

Petitioner,

v.

The Honorable Daniel A. DePasquale,
as Judge of the Seneca County Court,
et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICUS CURIAE

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization of approximately 250,000 members. The New York Civil Liberties Union is its state-wide affiliate. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied within the Bill of Rights.

The present case raises issues of particular interest to the ACLU and NYCLU because it involves an apparent, although we believe misconceived clash between two fundamental civil liberties concerns. On the one hand, the ACLU and NYCLU have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. Likewise, the NYCLU has actively litigated the question of public access to judicial hearings. Matter of Oliver v. Postel, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407 (1972). On the other hand, the ACLU and NYCLU have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity. This historic commitment to both sides of the

*Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

"free press - fair trial" debate places amici in a unique position to aid the Court in balancing these critical constitutional values.

QUESTIONS PRESENTED

Did the Court of Appeals correctly hold that a trial judge in a criminal trial of considerable local interest could constitutionally exclude the public from a pretrial suppression hearing without a particularized showing of likely and substantial prejudice to the defendants, without a finding that other methods of preventing prejudice would have been ineffective, and with the burden on the excluded members of the press to show a "genuine public interest. . . outweigh[ing] the risks of premature disclosure"?

STATEMENT OF THE CASE AND POSITION OF AMICI

On July 19, 1976, Wayne Clapp, a former policeman in a small upstate New York community near Rochester, was reported missing by the local news media after his bullet-ridden boat was discovered adrift in Seneca Lake. An unsuccessful search to uncover his body was promptly begun. Three days later, two youths, ages 16 and 21, were arrested in Michigan and charged with the crime. At the time of the arrest, front page articles reported that each of the defendants had made incriminating statements and that one of the defendants had led the police to the spot where he had buried Clapp's stolen revolver.

On November 4, 1976, a hearing was held on defendants' motion to suppress both their confession and the physical evidence discovered in Michigan. At the start of the hearing, defense counsel moved to exclude the public and the press, claiming only that evidentiary matters would be revealed "which may or may not be brought forth subsequently at trial." That request was orally granted by the trial judge without requiring the defendants to demonstrate the likelihood of prejudice if the hearing were open and without exploring the possibility that one of the procedural devices suggested in Sheppard v. Maxwell, 384 U.S. 333, 361-362 (1966), might be adequate to protect defendants' fair trial rights. On appeal, this lower court order was upheld by a divided New York Court of Appeals which ruled that whenever a criminal case has aroused some public interest, pretrial hearings should presumptively be closed at the defendant's request unless the members of the press or the public seeking access to the proceedings can show that "the magnitude of any genuine public interest . . . outweigh[s] the risks or premature disclosure." p. 9.

Amici respectfully suggest that this presumption in favor of closed judicial hearings is flatly inconsistent with our entire constitutional tradition. As this Court has observed on numerous occasions, the press and the public have a right to observe the judicial process at work. The decision to close the doors of the courthouse is an extraordinary step which can only be justified if no other alternatives exist. In short, it is a last resort, not a first option. The failure of the Court

of Appeals to appreciate that fact compels reversal by this court.

ARGUMENT

The Decision Below, By Permitting Criminal Proceedings To Be Closed Absent An Extraordinary Showing Of Necessity, Infringes The Public's Right To Information About The Criminal Process In Violation Of The First, Sixth And Fourteenth Amendments.

This Court has long recognized that public scrutiny of the judicial process is an important safeguard of our liberty: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 270 (1948). Public scrutiny is only possible, however, if the public is permitted to observe the judicial system in action and then freely discuss what has been observed. In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court protected the public's right to discuss judicial proceedings by holding that an extraordinary justification was required to sustain an order restraining the press from publishing information concerning a criminal case. See also Landmark Communications, Inc. v. Virginia, 46 USLW 4389 (May 1, 1978).

This case concerns the other necessary component of public scrutiny of the courts:

the right to observe judicial proceedings.* The order approved by the New York Court of Appeals in this case excluded the public and press from a pretrial suppression hearing in a murder case of grave public concern. It did so simply upon the request of the defendants, without any consideration of whether alternative means, less intrusive upon the vital constitutional interest in public information about the criminal process, would suffice to guarantee a fair trial.

In the view of the Court of Appeals, the only limitation on the discretion of trial courts to enter such orders is the provision of an opportunity for "interested members of the news media. . .to be heard . . .in a preliminary proceeding adequate to determine the magnitude of any genuine public interest [that] may be found to outweigh the risks of premature disclosure." 43 N.Y.2d at 381 (emphasis added). The standard applied by the Court of Appeals reverses the constitutional presumption in favor of open judicial proceedings and impermissibly treads upon the constitutional interest of the public and the press to information regarding the criminal justice system.

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*In Nebraska Press, this Court expressly reserved the question under what circumstances a trial court may constitutionally close criminal proceedings to the public in order to prevent the press and the public from obtaining information potentially prejudicial to a criminal defendant. 427 U.S. at 564 n. 8; cf. id. at 576 n. 3, 584 n. 11 (Brennan, J., concurring in judgment).

A. Closing pretrial suppression hearings to the public affects interests protected by the First and Sixth Amendments, and is therefore permissible, if at all, only when absolutely necessary to protect societal interests or individual rights of the highest importance.

The right of the press and the public to information about the functioning of the criminal courts is a basic constitutional right, protected by the First and Sixth Amendments, and essential to the proper working of a democratic government. As this Court has frequently recognized: "A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. at 374.

1. The First Amendment

The free discussion of matters concerning judicial proceedings is a central concern of the First Amendment. When the press reports factual information about the operation of the judicial system, it "clearly serve[s] those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." Landmark Communications, Inc. v. Virginia, 46 USLW at 4392. This Court has frequently emphasized how critical to the proper working of the democratic system envisioned in the First Amendment such public scrutiny of the judiciary is: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

Recognizing the importance of free discussion about what transpires in the courtroom, this Court has repeatedly rejected the use of the contempt power to punish those whose public statements about judicial proceedings appear objectionable to those courts. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, supra; Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). Attempts to prohibit the reporting of what transpires in court or quasi-judicial settings have been no more acceptable. Landmark Communications, supra; Cox Broadcasting, supra. And no opinion of this Court has yet sustained a prior restraint intended to preclude discussion of the judicial process. Nebraska Press Association v. Stuart, supra; Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

The present case, however, is somewhat different from those earlier decisions. Here the New York courts have not sought to prevent the press from printing information already in its possession, or from reporting what transpires in open court. Rather, by closing the court they have sought to prevent the public and the press from acquiring information. At first glance, such action may appear to collide less directly with First Amendment interests than a direct "gag order". But upon reflection, it becomes clear that at least in this context the apparent dichotomy between gag orders and closure orders is more mirage than real.

In practical effect, the ability of the public to make informed decisions about political matters can be undermined as much

by the government's suppressing information as by government restraints on the dissemination of that information by private citizens who have acquired it. Specifically, when a court seeks to close judicial proceedings to members of the press, as in this case, it interferes with the right of the press "to report whatever occurs in open court through their respective media," Estes v. Texas, 381 U.S. 532, 541 (1965), every bit as effectively, and with every bit as much danger of suppressing "the beneficial effects of public scrutiny upon the administration of justice," Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491, as if it had sought to enjoin the press from printing information already in its possession.* In fact, such an order is far more sweeping, since it prevents any member of the public or press from observing the functioning of the judicial process, and thereby thwarts the public's right to information about the courts even more drastically and completely. The First Amendment interest at stake in this case is therefore as significant as in Nebraska Press.

Moreover, the significant First Amendment interest in public attendance at, and scrutiny of judicial proceedings is one which is rooted in our nation's history and

*As the dissenting judges below observed, it is somewhat artificial to assume "that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it." 43 N.Y. 2d at 384.

one which this Court has long recognized in its opinions. Thus, when this Court declared in Craig v. Harney, supra, that "[a] trial is a public event," 331 U.S. at 374, the Court could only have relied on the First Amendment value in free and robust debate about the administration of justice since the underlying litigation which gave rise to petitioner's contempt citation was a civil property action to which the Sixth Amendment's guarantee of a public trial did not and could not extend.

Indeed, this Court has always recognized that protecting the right of self-expression is only one of the purposes of the First Amendment. Equally important is the purpose of fostering democratic self-government by prohibiting restraints on the discussion of public affairs, Mills v. Alabama, 384 U.S. 214, 218 (1966); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936), including judicial matters. Landmark Commission, supra. See generally, Saxbe v. Washington Post Co., 417 U.S. 843, 861-863 (1974) (Powell, Jr., dissenting); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). And as this Court has had frequent occasion in recent years to emphasize, the First Amendment therefore guarantees the right of the public to receive information as well as the speaker's right to impart it. First National Bank of Boston v. Bellotti, 46 USLW 4371, 4376 (April 26, 1978); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 764-765 (1976). See also Kleindeinst v. Mandel, 408 U.S. 753, 762 (1972).

It bears emphasis that to assert a First Amendment interest in open judicial proceedings is not to advance a claim of special privilege for members of the press to have access to places or events from which the general public is legitimately excluded. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public." Nixon v. Warner Communications, Inc., 46 USLW 4320, 4326 (April 18, 1978). See also Houchins v. KQED, 46 USLW 4830 (June 26, 1978); Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972). Rather, we maintain that the order of the New York courts in this case infringed a right of the public in general to scrutinize the judicial process.*

Amici recognize that under the decisions of this Court, the right of access to public information, unlike the right of free expression, is qualified. Thus, this Court has stated, in dictum, that the press and public may be excluded from such proceedings as "grand jury proceedings [and]

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*Of course, in most circumstances, it would be members of the press who would most actively seek enforcement of this right. As this Court has noted, "in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491.

our own conferences," and may even "be prohibited from attending . . . trials if such restrictions are necessary to assure the defendant a fair trial before an impartial tribunal." Branzburg v. Hayes, supra, 408 U.S. at 685 (emphasis added). And just a few weeks ago, this Court narrowly rejected a media claim of special access to prison facilities. Houchins v. KQED, supra.

At the same time, it is a significant fact that the very recent "right of access" cases arose in the prison context. See Houchins v. KQED, supra; Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). As the Court noted in Saxbe, "prisons are institutions where public access is generally limited," 417 U.S. at 849 (citations omitted). The same can hardly be said of this nation's courtrooms. Indeed, the explicit language of the Sixth Amendment, and this Court's opinions under the First Amendment, e.g. Craig v. Harney, supra, are expressly to the contrary.

Obviously, not all governmental functions must be conducted in the open; secrecy is sometimes necessary if they are to fulfill their purposes. Nevertheless, certain government activities have traditionally been conducted in public and are public by their very nature and must therefore, remain presumptively open to the public. As a distinguished Court of Appeals judge recently pointed out; "A decision by Congress or a state legislature to conduct all its business in secret would, I think, run afoul of the First Amendment. Similarly, a decision by the judiciary to conduct all its business in secret would not be immune

from First Amendment scrutiny." United States v. Cianfrani, F. 2d slip op. at 44 (3d Cir. Mar. 16, 1978) (Gibbons, J., concurring).*

The boundaries of that proposition are obviously uncertain in light of the Court's decision in Houchins v. KQED, supra. But it is not the boundaries which are at issue in this case. Rather, the decisive fact about this case is that it involves a criminal trial--an institution that not only has traditionally and necessarily been open to public scrutiny, and that performs its functions best in the light of public examination, but one that the Constitution specifically requires be conducted in the open.

2. The Sixth Amendment

The Sixth Amendment guarantee of a public trial in criminal cases is a fundamental principle of liberty. What this Court has called "[t]he traditional Anglo-American distrust for secret trials," In re Oliver, 333 U.S. at 268, is a long-standing aspect of our criminal justice system: its roots extend to the abolition of the Court of Star Chamber in 1641. Id. at 266. The importance of public scrutiny "as a

*In Cianfrani, the Pennsylvania affiliate of the ACLU took the position that a pretrial hearing could properly be closed if closure were necessary to protect from further invasion by disclosure the privacy of individuals who had arguably been the subject of illegal wiretapping. Without endorsing or disavowing that position, it is sufficient to note that similar interests are not involved in this case.

safeguard against any attempt to employ our courts as instruments of persecution" has long been recognized. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Id. at 270.

Although the requirement to a public trial is primarily intended to protect the defendant, the defendant is not its sole custodian. The text of the Sixth Amendment states that "the accused shall enjoy" a public trial, and insofar as the purpose of the guarantee is to limit the abuse of judicial power, the defendant can be counted upon to invoke the Amendment's protection. Nonetheless, the overwhelming weight of authority, as the Court of Appeals recognized in this case, supports a broader view, holding that the public as well as the defendant may invoke the amendment's command. See, e.g., United States v. Cianfrani, supra; United States v. Columbia Broadcasting System, 497 F. 2d 102 (5th Cir. 1974); Matter of Oliver v. Postel, supra.*

Quite clearly, interests other than those of the defendant are protected by the requirement of public trials. These include education of the public about the nature of

*This Court has never had occasion to decide the issue. See, e.g., Nixon v. Warner Communications, 46 USLW at 4326 n. 19. But see Houchins v. KQED, 46 USLW at 4834 n. 32 (Stevens, J., dissenting); Singer v. United States, 380 U.S. 24, 34-35 (1965).

the judicial process, In re Oliver, supra, 333 U.S. at 270 n. 24; preservation of public trust in the fairness of the courts, United States v. Cianfrani, supra, slip op. at 15, 25; United States ex rel. Lloyd v. Vincent, 520 F. 2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); the possibility that witnesses might learn of the trial and come forward to testify, In re Oliver, supra, 333 U.S. at 270 n. 24; the prevention of bias in favor of defendants resulting from corruption, Lewis v. Peyton, 352 F. 2d 791, 792 (4th Cir. 1965); and the right of the public to scrutinize the judicial process and to form its own conclusions about political issues affecting the judiciary,* United States v. Cianfrani, supra, slip op. at 15.

Moreover, issues might arise in a

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*In this regard, the First Amendment and Sixth Amendment serve overlapping purposes. Thus, the Sixth Amendment's guarantee of a public trial promotes the First Amendment interest in an informed citizenry. Correspondingly, the First Amendment interest in an informed citizenry requires open trials even in civil contexts where the Sixth Amendment does not apply. E.g. Craig v. Harney, supra.

trial, or in a pretrial suppression hearing,* that would be of significant public interest but that the defendant, the prosecutor, and

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*This Court has never considered whether the right to a public "trial" extends to pretrial hearings as well as to the trial on the merits. To hold that the guarantee is confined to the trial on guilt or innocence, however, would be to limit the protection of the Amendment, for both defendant and public, quite artificially. A pretrial suppression hearing like that in this case is often the critical stage of a criminal trial, cf. Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967), so that the defendant's interest in public scrutiny to assure fairness, and the public interest in preserving the appearance of fairness, are as great as at the trial on the merits; since disputed issues of fact are resolved at such a hearing by testimonial evidence, the possibility that new witnesses might come forward and the usefulness of public scrutiny as a check on perjury are equally great; and issues of public importance concerning the behavior of police officers and the costs and benefits of the exclusionary rule are aired only in such hearings. For these reasons, the lower courts have generally recognized that the right to a public trial extends to pretrial evidentiary hearings on suppression motions. See generally United States v. Cianfrani, supra, slip op. at 16-21, and cases there cited.

the court might each for their own purposes be content not to see revealed. In a case like this one, for example, the public has an important interest in observing the functioning of the exclusionary rule, both to evaluate the merits of proposals that the legislature alter the nature of that remedy, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), and to inform itself about possible government violations of constitutional norms. United States v. Cianfrani, supra, slip op. at 20. Yet the defendant's interest in preventing public knowledge of possible incriminating evidence, and the prosecutor's interest in suppressing knowledge of government misconduct, can prevent public awareness of these facts unless the public has an independent right to observe the criminal process. The broad purposes of the public trial clause can only be achieved, therefore, if it is recognized that the public, as well as the defendant, has a constitutionally protected interest in maintaining the openness of the judicial process.*

This is not to say that all hearings must be open without exception. Certainly the case law would not support any such absolute position. Under limited circumstances

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*The United States Court of Appeals for the Third Circuit, in recognizing the public's Sixth Amendment right to observe criminal proceedings, expressly rejected the New York Court of Appeals' reasoning in this case as "unacceptable." United States v. Cianfrani, supra, F. 2d at n. 4.

the courts have upheld the discretionary authority of trial judges to exclude members of the public from portions of trials or pretrial hearings when some compelling reason for secrecy existed, even over the objection of the defendant. Portions of hearings have been closed, for example, to protect the safety of witnesses, United States ex rel. Smallwood v. La Vallee, 377 F. Supp. 1148 (EDNY), aff'd, 508 F. 2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975), to maintain the integrity of government precautions to forestall hijackings, United States v. Clark, 475 F. 2d 240 (2d Cir. 1973), and to protect trade secrets, Stamicarbon N.V. v. American Cyanimid Co., 506 F. 2d 532 (2d Cir. 1974). Where the courts have taken such a drastic step, however, they have universally recognized "that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity," Bennett v. Rundle, 419 F. 2d 599, 607 (3d Cir. 1969) (en banc), and that "any order of exclusion must extend no further than the circumstances strictly warrant in order to meet the asserted justification for closure." United States v. Cianfrani, F. 2d at , slip op. at 27. See also United States v. Ruiz-Estrella, 481 F. 2d 723, 725 (2d Cir. 1973).

We agree with the Court of Appeals that the need to preserve a defendant's right to a fair trial before an impartial jury uncontaminated by prejudicial pretrial

publicity* is as important, if not more important, than the other interests that have been held to justify exclusion of the public from criminal proceedings in appropriate circumstances. But the importance of the interest allegedly served by judicial secrecy is only one of two factors which must be weighed in the balance before an order closing the courtroom can even be contemplated. The availability of alternative and less drastic remedies must also be considered in light of the strong constitutional presumption in favor of area proceedings. In this case that inquiry was never made. As a result of that failure, and the impermissibly lenient standard which they applied, the New York courts in this case permitted the vital constitutional rights of the press and public under the First and Sixth Amendments to be infringed although no real threat existed to the defendants' fair trial right which could not have been dealt with by other means.

B. In approving the unnecessary exclusion of the public and the press from the suppression hearing in this case, the Court of Appeals applied an erroneous standard which failed to consider alternative means of protecting defendants' rights without infringing the public's.

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*This right derives from the Sixth Amendment, and from the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., Irwin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965).

Given the nature of he public's constitutional right to observe the operation of the criminal courts, the exclusion of the public and press from criminal proceedings should be a last resort, "tested by a standard of strict and inescapable necessity." Bennett v. Rundle, supra, 419 F. 2d at 607. Therefore, before a court undertakes to exclude the public because of the possible prejudicial impact of material that may be the subject of suppression hearings, it must assure itself that an actual danger of such prejudice exists, and that it cannot be averted by less drastic means. Cf. Nebraska Press, supra.* The New York courts completely

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*In contrast to the holding of the Court of Appeals in this case, other courts have recognized that Nebraska Press also provides the appropriate standards for determining the propriety of closing pre-trial proceedings or court records to public scrutiny. Keene Publ. Co. v. Keene District Court, 380 A. 2d 261 (N.H. 1977) (pretrial hearing); Northwest Publications v. Anderson, 259 N.W. 2d 254 (Minn. 1977) (court records). Similarly, the Legal Advisory Committee on Fair Trial and Free Press of the American Bar Association, citing Nebraska Press, recommended that the ABA Standards Relating to Fair Trial and Free Press (1968), which had permitted exclusion of the press and public from pretrial hearings, be changed to forbid such closure unless there is shown "a clear and present danger to a fair trial in that:

> 1. There is a substantial likelihood that information prejudicial to the accuser's right to a fair trial would reach potential jurors; and

failed to do so in this case, and the opinion of the Court of Appeals, by setting a standard that encourages trial courts to close suppression hearings almost as a matter of course, assures that they will continue to do so in the future.

The trial judge in this case initially closed the suppression hearing to the public simply at the request of the defendants, finding only that "certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants." When petitioner appeared by counsel and moved the court to vacate the order, the judge found "a reasonable probability of prejudice to the defendants" and stood by his earlier order. No specific findings were made concerning the extent of the likely publicity for whatever information was expected to be revealed, the likelihood that such publicity would reach and prejudice potential jurors, or, most significantly, the possibility that the devices suggested by this Court in Sheppard v. Maxwell, supra, would adequately

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(fn. cont. from p. 19)
2. The prejudicial effect of such information on potential jurors cannot be avoided by alternative means. . . ."

ABA Legal Advisory Committee on Fair Trial and Free Press, Draft Standards Relating to Fair Trial and Free Press 3.1, at 6-7 (August 1, 1977).

protect the defendants' interests.*

The opinion of the Court of Appeals is even more cavalier in its disregard of the public's right to information about the operation of the courts. Strongly implying that the trial court has an obligation not "to allow public disclosure of potentially tainted evidence," 43 N.Y. 2d at 380, that court held that "where press commentary on pretrial suppression hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." Id. This presumption may be overcome only if "the magnitude of any genuine public interest [is] found to outweigh the risks of premature disclosure." Id. at 381.

The standards announced by the Court of Appeals are fatally defective in at least two ways. First, by insisting that pretrial hearings be opened only upon a showing of extraordinary interest in a particular case, the Court of Appeals ignores the public's constitutionally protected interest in observing and learning

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*The Court of Appeals' comment that the county court had "determin[ed] that open suppression hearings, if exposed to notoriety, would have deprived [the defendants] of any meaningful opportunity to receive a fair trial" represents, even in its conditional form, a considerable overstatement of the trial court's actual findings.

about the judicial process in every case. That interest compels that trials be normally open. Because it fails to give appropriate weight to the public's right to information about the functioning of the criminal courts, the Court of Appeals completely reverses the appropriate presumptions. Trials should be presumptively open unless the necessity of closing them to protect the defendants is proven, not, as the Court of Appeals held, presumptively closed at defendant's mere request unless the public demonstrates a peculiarly compelling interest in a particular case. The Court of Appeals stands virtually alone in failing to recognize that a defendant seeking a closed hearing bears a heavy burden or proof of likely prejudice. See, e.g., Phoenix Newspapers v. Jennings, 107 Ariz. 557, 490 P. 2d 563 (1971); Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977); State v. Lewis, 353 So. 2d 703 (La. 1977); State v. Allen, 73 N.J. 132, 373 A. 2d 377 (1977).

Second, rather than demanding a rigorous showing of the necessity for closing the hearing if the defendants' rights are to be protected, cf. Nebraska Press, supra, the court entirely fails to allow for the possibility that alternate means for protecting the defendant's rights might be found. Here again, the Court of Appeals sets itself against the many courts and commentators that have recognized the importance of determining whether alternatives to closing pre-trial hearings would suffice to protect defendants without sacrificing First and Sixth Amendment rights. Keene Publishing Co. v. Keene District Court, supra; State ex rel. Dayton

Newspapers v. Phillips, 351 N.E. 2d 127 (Ohio 1976); see also ABA Legal Advisory Committee on Fair Trial and Free Press, Draft Standards Relating to Fair Trial and Free Press, 2, 6-7 (August 1, 1977). In particular, the court appears to rule out the possibility of a change of venue. Yet the facts of this very case demonstrate the possibility that a change of venue can accommodate the public's right to know and the defendant's right to a fair trial. Indeed, the case would appear a classic one for a change of venue: because the victim was known only locally, the case was rather notorious in the immediate vicinity but caused hardly a ripple of interest in other parts of the State. Even in Sheppard v. Maxwell, supra, where this Court was faced with a barrage of pretrial publicity far in excess of anything shown here, Justice Clark observed:

> Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another country not so permeated with publicity. [Id. at 363-364.]

As we have pointed out, we do not seek a rule that pretrial suppression hearings always be opened to public scrutiny, regardless of the interest of the state or the defendant. On the other hand, to permit closure in accordance with

the lenient rule set forth by the New York Court of Appeals trespasses upon the public's interests in open proceedings. The standards for closing courtrooms that best protect the public's right without endangering the defendant's rights are analogous to those this Court announced in Nebraska Press.

At the outset, it is essential to emphasize, as the Court of Appeals did not, that the right of the public to access to the courts is of constitutional dimension, and not to be interfered with lightly. Therefore, it is to be presumed that all significant aspects of a criminal trial shall be conducted in the open. "It is only under the most exceptional circumstances that [even] limited portions of a criminal trial may be even partially closed." Stamicarbon N.V. v. American Cyanimid Co., supra, 506 F. 2d at 542.

Respect for this important constitutional interest requires that closure be permissible only after a court makes three critical findings. First, in order to close a pretrial hearing, the trial court must find a significant likelihood that, because of the notoriety of the case and the prejudicial nature of the evidence likely to be offered at a suppression hearing, an open hearing could impinge upon the defendant's right to a fair trial. It should be noted that the wide dissemination of even highly prejudicial material will not always interfere with a defendant's rights. See e.g. Murphy v. Florida, 421 U.S. 794 (1975).

Second, and it is here that standards set by the Court of Appeals are most deficient, the court must inquire "whether

measures short of an order [closing the hearing to the public] would have insured the defendant a fair trial." Nebraska Press, supra, 427 U.S. at 563. In this case, for example, it seems clear that a change of venue would have been sufficient to preserve the defendants' rights. In other cases, a continuance to allow the case to fade from public memory, or a careful voir dire at the time of jury selection, have proved equally effective.* See Nebraska Press, supra, 427 U.S. at 563-564; Sheppard v. Maxwell, supra, 384 U.S. at 357-362; United States v. Silverthorne, 400 F. 2d 627, 635-640 (9th Cir. 1968).

Finally, the court must consider whether or not an order closing the pretrial hearing would effectively prevent impairment of the defendant's rights. Cf. Nebraska Press, supra, 427 U.S. at 565-567. If, for example, the substance of the evidence to be introduced at the suppression hearing has already been made public, little purpose would be served by shielding the judicial response to that evidence from public scrutiny. Again, it would appear from the record in this case, that by the time of the suppression hearing the press had already reported defendants' confession and the

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*The availability of these alternate remedies negates any argument that closure is necessary to effectuate the purposes of the exclusionary rule. Incompetent and prejudicial evidence can be kept from the jury without any sacrifice of First and Sixth Amendment rights through the simple device of change of venue in those few cases where pretrial publicity is a serious problem.

fact that the police had been led to the victim's missing gun.

Under the proposed rule of the Court of Appeals, pretrial hearings in virtually any criminal case that attracts some publicity can be closed to the public, and the primary avenue through which the public can observe the costs and benefits of the exclusionary rule, and learn of the conduct of their public officials that often requires the exclusion of evidence, will needlessly be lost.* As we stated at the outset, pretrial proceedings should only be closed as a last resort in that rare criminal case where the defendant's right to a fair trial is genuinely and demonstrably threatened, and cannot be otherwise assured. If this simple rule is followed, then the rights of the defendant as well as those of the public will be fully guaranteed.

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*It is not a sufficient answer that suppression hearings in cases in which the public is not interested will remain open, or that under the Court of Appeals' opinion transcripts of the hearings will be available even in notorious cases after the trial is over. The beneficial effects of public scrutiny cannot be obtained if such scrutiny is allowed only in cases, or at times, in which a lack of interest indicates that little scrutiny will occur. This Court has in the past been particularly careful in reviewing restraints on the public's right to receive information that "produce their restrictive results at the precise time when public interest in

Taken together, the First and Sixth Amendments, mandate a system in which the press and the public are free to observe criminal trials, and then to report what they see and hear to the community so as to assure the "contemporaneous review in the forum of public opinion" that is the most effective safeguard against abuse of judicial power. In re Oliver, supra, 333 U.S. at 270. While pretrial proceedings may be closed to the public in the rare case where it is imperative to protect a defendant's right to a fair trial, the Court of Appeals in this case permitted exclusion of the public where no such necessity was shown, and its judgment must therefore be reversed.

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*(fn. cont. from p. 26)
the matter discussed would naturally be at its height." Bridges v. California, supra, 314 U.S. at 268. See also Mills v. Alabama, supra.

CONCLUSION

For the foregoing reasons, the decision of the New York Court of Appeals in this case should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, et al.,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

BRIEF OF *AMICI CURIAE* THE DEADLINE CLUB, THE NEW YORK CITY CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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Preliminary Statement

The Deadline Club, the New York City Chapter of the Society of Professional Journalists, Sigma Delta Chi ("Deadline Club") and the Society of Professional Journalists, Sigma Delta Chi ("Society") submit this brief *amici curiae* in support of the Petitioner in this proceeding, Gannett Co., Inc. All parties to this

proceeding have given their written consent to the filing of this brief, copies of which have been filed with the Clerk of this Court.

Interest of the *Amici Curiae*

The Deadline Club, an unincorporated professional association, is located in New York City. It is primarily an organization of working journalists affiliated with New York City's and the nation's major news organizations. It has a membership of 600, including such prominent journalists as Walter Cronkite and Mike Wallace of CBS News; Frank Blair, formerly of NBC News; Roone Arledge of ABC News and Sports; Gabe Pressman of WNEW-TV; Arthur O. Sulzberger and Peter Kihss of the *New York Times*, as well as journalists working for such major news organizations as The Associated Press, United Press International, *New York Daily News*, *Wall Street Journal*, *Women's Wear Daily*, and the three major news weeklies — *Time*, *Newsweek*, and *U.S. News and World Report*. Essentially, the membership of the Deadline Club consists of those reporters in New York City who would be locked out of covering pre-trial proceedings, if the New York State Court of Appeals decision in this case were allowed to stand.

The Society is the parent organization of the Deadline Club. The Society has some 35,000 members, primarily working journalists and journalism students, affiliated with over 250 chapters across the country. It is the largest organized group of journalists in the nation encompassing all aspects of the profession. For its part, the Society is fearful that a rule permitting the capricious closing of pre-trial proceedings will not only impede the work of its members in New York State, but could set the stage for similar restrictive rulings in other states as well.

In sum, both the Deadline Club and the Society feel that their members will not be able to report the news about the administration of justice, if they are forced to stand in the corridors outside of closed courtrooms.

Questions Presented

The *amici* adopt the Questions Presented, as set forth in the Brief of Petitioner Gannett Co., Inc.

Constitutional Provisions Involved

The *amici* adopt the Constitutional Provisions, as set forth in the Brief of Petitioner Gannett Co., Inc.

Statement of the Case

The *amici* adopt the Statement of the Case, as set forth in the Brief of Petitioner Gannett Co., Inc.

Summary of Argument

The *amici* make the following arguments:

I. The Lock-Out Of Journalists Under The Rule Adopted By The New York Court Of Appeals Is An Attempt To Evade The Tests Of *Nebraska Press Association* v. *Stuart* Against Prior Restraints, And In Fact These Tests Of *Stuart* Should Be Applied In This Case.

II. The American Public Has a Right To Know The Activities Of Its Judiciary And This Knowledge Is Essential In A System Of Self-Government.

III. The Functions Of Editors Should Be Left To Professional Journalists and Not Judges.

POINT I

THE LOCK-OUT OF JOURNALISTS UNDER THE RULE ADOPTED BY THE NEW YORK COURT OF APPEALS IS AN ATTEMPT TO EVADE THE TESTS OF *NEBRASKA PRESS ASSOCIATION* V. *STUART* AGAINST PRIOR RESTRAINTS, AND IN FACT THESE TESTS OF *STUART* SHOULD BE APPLIED IN THIS CASE.

In *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), this Court brought to an end, except in the most extreme circumstances, instances in which a trial judge could prohibit the media from publishing or broadcasting information that he considered might be harmful to a defendant's right of fair trial. Generally, the kind of information that trial courts had restrained during the heyday of the gag order was news about confessions and admissions which the courts felt might turn out to be inadmissible at trial. Not atypically, the *Nebraska* case itself involved a court order restraining the media from publishing or broadcasting accounts of confessions and admissions made by the accused before trial. 427 U.S. at 539.

In the *Nebraska* case, in generally disallowing such restrictive orders, this Court tipped the scales heavily in favor of the interest of an open judiciary as against the theoretical threat to the fair trial of a criminal defendant.* Specifically, this Court held in *Nebraska* that, before a trial court could impose a prior restraint on the media, it must gauge (1) the nature and extent of the pre-trial publicity involved and its probable impact on prospective jurors; (2) the effectiveness of measures other than a restraining order in mitigating any prejudice that might be involved; and (3) the probable efficacy that such an order would

*As to those rare instances when a prior restraint order can be imposed, the *Nebraska* Court quoted Learned Hand to the effect that they are justified only when "the gravity of the 'evil,', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 427 U.S. at 562.

have in reducing the dangers to the accused's right for a fair trial.

Only if these strict criteria are met, this Court held, can a restraining order against the media be entered, under the First Amendment of the Constitution.

The *amici* argue that at the very least, these tests of *Nebraska Press Assn.*, or something very similar, should be required before trial courts can lock-out the press from proceedings at which the admissibility of confessions and admissions by the accused is determined. In short, before a trial judge is allowed to clear a courtroom, he should be required to make a factual assessment of the nature and extensiveness of the pre-trial publicity involved and its probable impact on jurors. He should also be required to consider other measures that might mitigate possible prejudice, such as the devices discussed in the *Nebraska* case from *Sheppard* v. *Maxwell*, 384 U.S. at 357-362, *i.e.*, change of venue, postponement of trial, questioning of prospective jurors, and clear instructions to each juror. 427 U.S. at 563. Finally, before ordering a press lock-out, the trial court should have to make a judgment as to the efficacy of such a measure in reducing the alleged dangers to the defendant's right to fair trial. As regards this final consideration, already extensive publicity about a confession would make a lock-out of the press at a proceeding to consider the admissibility of this confession pretty much useless.

The *amici* argue that the test of *Nebraska Press Assn.* is appropriate to apply to the case at bar because the press' First Amendment right to gather the news* is closely akin to the

*This Court gave constitutional recognition to the press' right to gather the news in *Branzburg* v. *Hayes*, when it said, "... news gathering is not without its First Amendment protections...". 408 U.S. 665, 707 (1972).

press' right under the First Amendment to be free from prior restraint.* In fact, if anything, the right of the press to gather the news is even more important to the press' editorial function than the absence of prior restraint, as conceptually it is a restraint on the press even more prior than a prior restraint. Furthermore, a press which is locked out of a news event does not even have the facts to argue that what it would report is deserving of public dissemination. At least the press has this opportunity in the prior restraint area.

In this discussion of the press' news gathering right, it is important to note that the *amici* are not arguing in favor of an affirmative duty by government to provide special press access to a news site or a news event. The *amici* recognize that this Court has held "that the Constitution [does not impose] upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817 (1974). *Also see, Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974).** In fact, as a

*Some courts have considered interference with the press' right to gather the news as falling under the definition of prior restraint. *See, e.g., CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

**This Court, in *Houchins* v. *KQED*, 38 CCH S. Ct. BULL. p. B3806 (1978), has recently affirmed the holdings of *Pell* and *Saxbe* in the media access to prison context. As the three-justice majority stated in *Houchins*, reversing the Court of Appeals below:

> "We, therefore, reject the Court of Appeals' conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions."

Id. at B 3819.

One might note the obvious that courtrooms, the scene of constitutionally mandated public trials, are neither prisons, nor mental institutions.

Furthermore, although there is language in the three-justice majority opinion in *Houchins* which categorically states that,

Footnote continued on next page—

—Footnote continued from preceding page

> "Neither the First Amendment nor Fourteenth Amendment mandate a right of access to government information or sources of information within government control."

Id. at B3820,

the basic thrust of the opinion follows *Pell* and *Saxbe*, to-wit, that

> "the media has no *special* right of access to [a jail] different or greater than that afforded the public generally." [Emphasis added]

Id. at B3820-21.

In addition, it can be argued that the reach of the *Houchins* majority doctrinally extends only as far as the concurring opinion of Mr. Justice Stewart, whose vote was necessary to overcome the three-justice dissent. Mr. Justice Stewart, in his concurring opinion, specifically noted that:

> ". . . the First and Fourteenth Amendments require the Sheriff to give members of the press *effective* access to the same areas [as those where members of the public were permitted]."

Id. at B3823.

"[E]*ffective* access" is defined in the concurrence as access to the jail "at reasonable times and hours" and with the use by the media of "cameras and recording equipment."

Also, Mr. Justice Stewart said that he did "not foreclose the possibility of further relief for *KQED* [the television station seeking access] on remand."

The three-justice dissenting opinion, which Mr. Justice Stewart might ultimately convert to a majority, states flatly that:

> "The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas."

Id. at B3836.

Thus, in summary, even the most restrictive reading of *Houchins* does not move the Court beyond the parameters of *Pell* and *Saxbe*, to the effect that the press enjoys no *special* right to access as against the general public.

general proposition, a special press access right granted, or withheld, at the whim of government might not be good policy, as it might color the necessary disinterest that the press should have in its coverage of government, and create a press dependent on favors granted by government.

But special press access is *not* the question before this Court. In the case at bar, the media seek not special access to a place where the public has been excluded, but rather the press seeks to be let in to a place that has traditionally been open to the public in this country, *i.e.*, the courtroom. Furthermore, these heretofore open courtrooms, it is worth noting, are maintained by public funds, the judges and court personnel are on the public payroll, and the business conducted therein is public business.

Up until now, courtooms have been open to press and public, except in the most extraordinary circumstances. As this Court noted in *Craig* v. *Harney*, 331 U.S. 367 (1947):

> "A trial is a public event. What transpires in the courtroom is public property."

331 U.S. at 374.

Even in those extraordinary circumstances of exclusion, lock-out orders are tailored as narrowly as possible.*

Nor should deviation from the open court tradition be permitted simply because the proceedings are pre-trial, rather than the trial itself. At the pre-trial proceeding, there is a public judge going about the public's business. There is also an expenditure of public funds, and thus the press should be watching at these proceedings as well.

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*See, e.g., *Estes* v. *Texas*, 381 U.S. 532 (1965), where the court makes clear that, although television cameras should have been excluded under the facts of that case, broadcast journalists themselves emphatically should not.

In *Nebraska Press Assn.*, this Court set forth the extraordinary lengths to which a trial court should have to go to before it could order the media not to publish or broadcast information that was in its possession. Now, quite frankly, to evade these strictures, some courts are locking out the press rather than issuing clearly prohibited gag orders. A most appropriate response by this Court would be to apply the *Nebraska Press Assn.* "prior restraint" test to the lock-out situation as well. The interests in the two situations are almost identical. So should be the judicial response.

POINT II

THE AMERICAN PUBLIC HAS A RIGHT TO KNOW THE ACTIVITIES OF ITS JUDICIARY AND THIS KNOWLEDGE IS ESSENTIAL IN A SYSTEM OF SELF-GOVERNMENT.

"For speech concerning public affairs is more than self-expression; it is the essence of self-government", this Court noted in *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). In recognition of this principle, this Court has greatly cut back the right of recovery of public officials who are plaintiffs in defamation actions. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The reason, of course, that free speech about public affairs is *more* than self-expression is that, in a free system of self-government, what the public knows about its government is essential to the operation of the system. For, without knowledge of public affairs, the ultimate governors, who are the people, cannot rule reasonably or intelligently.

This thought is hardly a new one. As James Madison wrote,

> "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both."

9 Writings of James Madison 103 (G. Hurst ed. 1910).

More recently, a distinguished legal commentator discussed the same principle. He said:

> "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*" [Emphasis in the original]

A. Meiklejohn, *Free Speech, and Its Relation to Self-Government*, at 37.

This Court, in the area of broadcast regulation, has also recognized that the public's acquaintance with information is a First Amendment value of even higher importance than the traditionally protected right of free expression. This Court noted in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), in upholding the Fairness Doctrine:

> ". . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*" [emphasis added]

395 U.S. at 390.

Also, in recent commercial speech cases, this Court has recognized a First Amendment right of consumers to a free flow of commercial information. *See, e.g., Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). This First Amendment right to information was considered a higher value than the self-expression of the groups involved to regulate their members' conduct.

Finally, and specifically relating to the importance of a flow of information about the judiciary to the public, this Court said in *Nebraska Press Assn.*:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of the system is of crucial import to citizens concerned with the administration of Government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."

427 U.S. at 527 (Brennan J., concurring).

See, also, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-496 (1975); *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966).

It is especially important that the operation of the courts during pre-trial proceedings be open to public view. Over the past two decades, this Court, in a whole series of decisions relating to confessions, searches, line-ups and police interrogations, *see, e.g., Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *United States* v. *Wade*, 388 U.S. 218 (1967), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), has made the pre-trial proceeding in many instances more important than the trial itself. Thus, whether a confession, or the fruits of a search, or an admission made during an interrogation, or a line-up identification are admitted or not, in many instances determines whether a criminal defendant will be found guilty or innocent. To permit this often controversial process to be conducted in secret, as the New York Court of Appeals would allow in this case, would thus allow the core of the criminal justice process to take place behind closed doors. This truly would be a

mutilation of the thinking process of the community, and a prologue to a tragedy or a farce, or both.*

With the public's right to know as crucial as it is in the case before this Court, either a *per se* rule mandating the openness of pre-trial proceedings should be established by this Court, or, at the very least, the test of *Nebraska Press Assn.* should be applied. The principle that this case involves, close as it is to the essence of self-government, demands no less.

POINT III

THE FUNCTIONS OF EDITORS SHOULD BE LEFT TO PROFESSIONAL JOURNALISTS AND NOT JUDGES.

In the context of holding that broadcaster editors should not be forced to air the editorial opinions of others, this Court stated in *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 124-125 (1973):

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors — newspaper or broadcast — can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility — and civility — on the part of those who exercise the guaranteed freedoms of expression.

In a similar vein, and speaking specifically of judges assuming the role of editors in the prior restraint area, this Court said in *Nebraska Press Assn.*:

*So important is public knowledge of the activities of the judiciary that it could be argued that access to this information by the public is an extra-constitutional right, *i.e.*, one never surrendered to federal authority but rather is reserved for the people, as recognized under the Ninth and Tenth Amendments. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

> ". . . the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges." [Citations omitted]

427 U.S. at 613 (Brennan, J. concurring).

The ultimate impact of the case at bar, if the rule of the New York Court of Appeals is permitted to stand, would be editorial. It would mean that a trial judge in a case such as this would have the editorial power to edit from a newspaper news about a particular event. That a court would exercise this power by means of locking the courtroom door rather than by donning a green eye shade and sitting in an editor's chair is immaterial. The effect is the same in both instances — news from the courtroom would simply not appear in the newspaper.

Furthermore, even though the prosecutor and the defense would be present at these closed proceedings, their interests could well be antithetical to the general public interest. As a matter of fact, this is what happened in the case at bar when the prosecution acquiesced to the defense's request to bar the press and the public from the courtroom.

Thus, for the reason that judicial editing should only be allowed in the most extreme instances, the New York Court of Appeals opinion in the case at bar should be reversed.

Conclusion

For each of the above-discussed arguments, the *amici* urge that the New York Court of Appeals decision in this matter should be reversed.

DATED: New York, New York
July 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
STATE OF NEW YORK COURT OF APPEALS

BRIEF OF THE NEW YORK TIMES COMPANY AS *AMICUS CURIAE*

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HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
STATE OF NEW YORK COURT OF APPEALS

BRIEF OF THE NEW YORK TIMES COMPANY AS *AMICUS CURIAE*

This brief is submitted by The New York Times Company ("the *Times*"), as *amicus curiae*, in support of the position of petitioner Gannett Co., Inc.

Interest of the *Amicus**

The *Times* publishes, *inter alia*, *The New York Times* and thirteen newspapers in Florida and North Carolina.

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* The *Times* adopts so much of the brief of petitioner as sets forth the opinions below, jurisdiction, questions presented, constitutional provisions involved and statement of the case. All the parties to this litigation, by their attorneys, have consented to the filing of this brief. Their consents are on file with the Clerk of this Court.

Subsequent to the ruling of the New York Court of Appeals in this case, the *Times* has been effectively—and almost routinely—precluded from attending, and thus reporting about, a number of significant pretrial hearings which have transpired in the New York courts. At one of those hearings the *Times* sought permission from the Court to attend, urging on the Court, *inter alia*, that a confession of the defendant had already been widely disseminated by law enforcement authorities and thereafter published in the press and that the case was one of significant public interest in determining whether defendants of diverse backgrounds received equal treatment under the law.* Notwithstanding those facts, the Court barred the press from attending the hearing, concluding—under the standards set forth in the *Gannett* case—that there was no "genuine public interest" in the case that would outweigh the alleged risks of public disclosure of what occurred at the pretrial hearing. New York Times, May 9, 1978, at 40, col. 1.

The Times believes that the *Gannett* decision unnecessarily and unconstitutionally deprives the public of information which is of central import with respect to the functioning of the entire criminal justice system. It submits this brief to join with Gannett in seeking reversal and to add certain material to that contained in Gannett's submission.

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* In fact, in an article published in the *Times* prior to trial, the author observed,

> "Had this murder involved, say, lovers from the lesser neighborhoods of Westchester, it would not have been front-page news, nor would the trial be of interest. We read about such killings as if, given those circumstances and those people, violence is predictable. The murder of Bonnie Garland was not predictable. It was not only the first nonpolice homicide in Scarsdale history, it was the first killing that involved members of the Yale community as victim and perpetrator. As such, it had a powerful impact on the lives of many people who had never confronted the reality of violence in their daily lives." Kornbluth, "A Fatal Romance at Yale," New York Times, May 7, 1978, § 6 (Magazine), at 45, 86.

ARGUMENT

The Gannett brief sets forth at length the salient legal principles which govern this appeal. The summary rejection by the Court of Appeals of the less restrictive alternatives as set forth by this Court in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976),* the similar rejection by it of the views set forth in the current draft of the Committee of the American Bar Association** which has considered this subject, and the decision by it to distinguish "mere curiosity" of the public as opposed to "legitimate public concern," *** provide ample bases for reversal by this Court. To those arguments and others in the Gannett brief, we add the following:

1. *The Central Significance of Pretrial Hearings*

Much of the decision of the New York Court of Appeals appears to be based upon a distinction drawn by the Court between pretrial hearings and trials. The press and public, the Court emphasizes, was not excluded from "a trial on the merits" or "from a highly sensationalized murder trial" but merely from a pretrial suppression hearing. (Pet. 8a, 9a.)

What this part of the Court's analysis ignores is precisely what the recent ruling of the Court of Appeals for the Third Circuit in *United States* v. *Cianfrani*, 573 F.2d 835, 850 (3d Cir. 1978), recognizes: that "decisions crucial

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* "Continuance, extensive *voir dire* examinations, limiting instructions, or venue changes may prove paltry protection for precious rights. . . ." Pet. 10a.

** American Bar Association, Standing Committee on Association Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. Tentative Draft, 1978).

*** Pet. 11a. *See, e.g., FCC* v. *Pacifica Foundation*, 46 U.S.L.W. 5018, 5027 (U.S. July 3, 1978) (Powell, J., concurring).

to the outcome of the entire criminal case" are commonly made at just such hearings.* It is at pretrial suppression hearings that the government, failing to meet its burden of proof, may well be forced to drop its entire case. It is at pretrial suppression hearings that a defendant, failing to persuade a court to suppress, may choose to enter a guilty plea. Moreover, it is at pretrial suppression hearings that suspiciously close relationships between prosecutors and defendants—or even judge and defendants—may often be detected. *United States* v. *Cianfrani, supra*, 573 F.2d at 850, 853; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio St.2d 457, 466-67, 351 N.E.2d 127, 133-34 (Ohio 1976).

The *Dayton* case is a particularly persuasive precedent in this area. There the Supreme Court of Ohio overruled an order of a trial court which closed the courtroom, excluded the public, and barred the press from publishing any news report about what transpired in the courtroom hearing on defendant's pretrial motions to suppress evidence. The defendant was indicted for kidnapping, extortion, and aggravated murder. There was extensive media coverage of the crime, arrest, and indictment. The defendant moved for a change of venue and filed motions to suppress evidence and a motion which resulted in the trial court's closure order. The trial court, like the New York Court of Appeals in the case at bar, gave little consideration to a change of venue. 46 Ohio St.2d at 464, 351 N.E.2d at 132.

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* *Accord*, *United States* v. *Lopez*, 328 F.Supp. 1077, 1087 (E.D. N.Y. 1971) (observing that the suppression hearing is "often the crucial stage" of a criminal proceeding). *See also United States* v. *Clark*, 475 F.2d 240, 247 (2d Cir. 1973):

> "In many criminal prosecutions the disposition of the motion to suppress is as important as the trial itself, since granting of the motion may require entry of a judgment of acquittal for lack of other proof sufficient to convict."

The Ohio Supreme Court held that the trial court's closure order violated the First Amendment and the Ohio Constitution, that the First Amendment and Ohio Constitution required the court to hold a public hearing on the motions to suppress, and that after the completion of the suppression hearing, the trial court was to rule on the defendant's motion for change of venue. 46 Ohio St.2d at 461, 351 N.E.2d at 130-31. The court's rationale is instructive and one which we urge on this Court:

> "A hearing on a motion to suppress evidence is a sensitive and extremely important proceeding. The issues in such a hearing are often the competence, efficiency, judgment, courage and behavior of the police, the prosecutor, the defense counsel, the court employees and the judge. Because of corruption or malice, a secret judicial proceeding may be and has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent and corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. The public and the victims of crime are entitled to know what is going on. The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches. A free press is the only guarantee a citizen has of his right to know what is going on in his government." 46 Ohio St.2d at 466-67, 351 N.E.2d at 133-34.

See also State v. *Allen*, 73 N.J. 132, 373 A.2d 377 (1977).

The critical role of pretrial procedures is reflected in the actual disposition of criminal cases in state and Federal courts. Of course, most cases are never tried. For example,

in 1976 there were 19,812 dispositions of defendant-indictments* in the New York State Supreme Court in New York City. Only 10.3% of these dispositions were by trial. In comparison, 64.1% of the dispositions were guilty pleas (10,960 felony pleas;** 1,741 misdemeanor pleas). Furthermore, 5,069, or 25.6%, of the dispositions were dismissals. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 23, 51, 52 (1977) (hereinafter "*Twenty-Second Annual Report*").

Similarly, in 1976 dispositions of defendant-indictments in the Supreme Court and County Courts of New York State outside New York City, totaled 17 850. Of these 13,305, or 74.5%, were by guilty pleas and 3,371, or 18.9%, were by dismissals of indictments by the Courts. Only 1,174, or 6.6%, were by trial. *Twenty-Second Annual Report,* at 24, 55, 56. In Seneca County itself, 31 of a total of 37*** dispositions for the period January 5, 1976 through January 2, 1977 were by guilty pleas. The remainder were by dismissals of indictments by the court.† There were no trials. *Id.* at 54-55.

The dispositions of criminal defendants in the Federal District Courts reveal the same pattern. For example, for

* Each defendant is considered separately for each indictment with which he or she is charged. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 23 (1977).

** Felony pleas represented 86.3% of all pleas. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 52 (1977).

*** This figure includes indictments disposed of in cases initiated prior to the period January 5, 1976 through January 2, 1977. *Twenty-Second Annual Report,* at 54-55.

† This figure includes, among others, those indictments dismissed against defendants sentenced on another indictment or disposed of by consolidation, those in which the defendants were civilly committed to the Commissioner of Mental Hygiene or to the Office of Drug Abuse Services, and those abated by the death of the defendant. *Twenty-Second Annual Report,* at 54-55.

the twelve month period ended June 30, 1977, a total of 53,189 criminal defendants were disposed of in the United States District Courts.* Of these defendants 35,336 were disposed of by pleas of guilty or *nolo contendere,* and 9,941** were disposed of by dismissals. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 255, 357, 370-73 (1977).

2. *The Nature of Pretrial Hearings*

Apart from the central significance of pretrial hearings, the fact remains that their nature virtually parallels that of a trial itself.

A pretrial suppression hearing has the "characteristics of a testimonial hearing, which is the essence of a trial proceeding." *United States* v. *Cianfrani, supra,* 573 F.2d at 850. Witnesses are sworn and are subject to cross examination. Pressure is exerted on both sides—on the government's witnesses to justify their procedures and on the defendant to suppress the evidence. Credibility is in issue, and the final determination depends on the findings of the trier of fact. Thus, the hearing is "in form the equivalent of a full trial." *Id.* ***

* This figure includes all offenses and represents non-duplicated dispositions. A defendant who is involved in more than one case is only counted once, in order to obtain a count of defendants disposed of, rather than of cases in which defendants were terminated. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 255, 357 (1977).

** This figure includes defendants who were committed pursuant to Title 28 U.S.C. 2902 of the Narcotic Addict Rehabilitation Act of 1966. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 373 (1977).

*** In *United States* v. *Cianfrani,* the Court of Appeals for the Third Circuit relied extensively on its opinion in *United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599 (3d Cir. 1969). There the Court held that a *Jackson* v. *Denno* hearing on the admissibility

Moreover, a pretrial suppression hearing is within the ambit of the Sixth Amendment's guarantee of a public trial. *See, e.g., United States* v. *Clark, supra,* 475 F.2d at 246-47; *United States* v. *Cianfrani, supra,* 573 F.2d at 850; *United States* v. *Lopez, supra,* 328 F.Supp. at 1087.

The Sixth Amendment guarantees to a public trial "has always been recognized as . . . an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948). It is, as well, a deterrent to possible perjury by witnesses who know that their testimony is exposed to public knowledge, a means to bring the proceedings to the attention of unknown parties who may have important testimony, and an opportunity for the public to learn about their government and acquire confidence in their judicial remedies. *Id.* at 270 n. 24. *Accord, United States* v. *Cianfrani, supra,* 573 F.2d at 847; *United States ex rel. Bennett* v. *Rundle, supra,* 419 F.2d at 606; *United States* v. *Lopez, supra,* 328 F.Supp. at 1087. *See also People* v. *Hinton,* 31 N.Y.2d 71, 73, 286 N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972), *cert. denied,* 410 U.S. 911 (1973).

The policies behind the Sixth Amendment's guarantee to a public trial clearly apply to a suppression hearing. *United States* v. *Cianfrani, supra,* 573 F.2d at 850; *United States* v. *Clark, supra,* 475 F.2d at 247. Moreover, since a pretrial suppression hearing may be the only time at which

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of a defendant's confession, which is held as part of the trial and after the jury is sequestered, is within the Sixth Amendment guarantee to a public trial. *Id.* at 606. In *Bennett* the Court reasoned that a *Jackson* v. *Denno* hearing has characteristics of a testimonial hearing and is thus equivalent to a trial proceeding, *id.* at 605, and that the policies behind the Sixth Amendment "have significant application" in such a proceeding, *id.* at 606.

In *Cianfrani* the Court noted that its reasoning in *Bennett* should not be confined to the facts of that case, since it is applicable to cases involving pretrial suppression hearings. *United States* v. *Cianfrani, supra,* 573 F.2d at 849.

police conduct is publicly scrutinized, these policies assume a unique importance at the pretrial stage of a criminal proceeding:

> "[B]ecause of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned, the right to public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy. See United States ex rel. Bennett v. Rundle, *supra,* at 606; United States v. Lopez, *supra,* 328 F. Supp. at 1087." *United States* v. *Clark, supra,* 475 F.2d at 246-47.

See also United States v. *Cianfrani, supra,* 573 F.2d at 850; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips, supra,* 46 Ohio St.2d at 466-67, 351 N.E.2d at 133-34.

The guarantee to a public trial is a right conferred on both the defendant and the public. *United States* v. *Cianfrani, supra,* 573 F.2d at 852-54; *United States* v. *Kobli,* 172 F.2d 919, 924 (3d Cir. 1949); *United States* v. *Lopez, supra,* 328 F.Supp. at 1087; *People* v. *Hinton, supra,* 31 N.Y.2d at 73, 286 N.E.2d at 266, 334 N.Y.S.2d at 887.

Sixth Amendment rights have thus often been vindicated in actions commenced by the press, as well as by a threatened defendant. *See, e.g., Oliver* v. *Postel,* 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); *E.W. Scripps Co.* v. *Fulton,* 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); *Phoenix Newspapers, Inc.* v. *Superior Court,* 101 Ariz. 257, 418 P.2d 594 (1966); *Phoenix Newspapers, Inc.* v. *Jennings,* 107 Ariz. 557, 490 P.2d 563 (1971); *Johnson* v. *Simpson,* 433 S.W.2d 644 (Ky. 1968). And in numerous other cases, the public's right to a public trial has been held to govern

over a defendant's desire for a less open trial. *See, e.g., State* v. *Allen, supra; Lyles* v. *State,* 330 P.2d 734 (Okla. Crim. App. 1958); *Cox* v. *State,* 3 Md. App. 136, 238 A.2d 157 (Spec. App. 1968); *People* v. *Holder,* 70 Misc.2d 31, 332 N.Y.S.2d 933 (Sup.Ct. Queens Co. 1972). *See also In re Oliver, supra.* As summarized by the Court in *Oxnard Pub. Co.* v. *Superior Court,* 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution, breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judge in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or ex-

> cesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

Precisely the same consideration suggest the desirability of public pretrial proceedings.

3. *The First Amendment Factors*

In addition to the other factors set forth in this brief, there remain the significant First Amendment factors set forth in Judge Gibbons' concurring opinion in *Cianfrani.* There, after quoting from this Court's opinion in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975), Judge Gibbons observed:

> "The *Cox Broadcasting* case does not, of course, tell us what records or proceedings *must* be open. It does suggest, however, that the public's right to be informed about the conduct of judicial proceedings rests upon the broader constitutional foundation of the first amendment and is therefore equally applicable to civil and to criminal proceedings. Nothing in either *Pell* v. *Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), or *Branzburg* v. *Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), suggests a contrary interpretation of the first amendment. Both recognize that the press enjoys no greater right of access to information than does the public generally. Neither, however, suggests that there is no constitutionally protected right of public access, at least to the extent we have in this case recognized it, to information about how one of the three great political branches of our government conducts its business. A decision by Congress or a state legislature to conduct all its business in secret would, I think, run afoul of

> the first amendment. Similarly, a decision by the judiciary to conduct all its business in secret would not be immune from first amendment scrutiny. Applying that scrutiny in this case, for the policy reasons set forth in Chief Judge Seitz's opinion, I agree fully with the disposition he has arrived at." 573 F.2d at 862-63.

Nothing, we believe, in this Court's recent opinion in *Houchins* v. *KQED, Inc.*, 46 U.S.L.W. 4830 (U.S. June 26, 1978), detracts from the force of Judge Gibbons' observations. In this case, the Court is not faced with any of the "problems" associated with "prison administration". *Id.*, at 4832 (Burger, C.J.). Nor is there present here any basis for the concerns set forth in Justice Stevens' opinion with respect to quite different contexts—*e.g.* confidentiality of the decision making process of government. *Id.*, at 4838-39 (Stevens, J., dissenting).

Indeed, this case well illustrates the differences between prisons and courtrooms. Prisons are, of course, generally closed, courtrooms generally open; to say that because the press and public may be barred from one, they may also be barred from the other suggests, at the very least, a disturbing insensitivity to the different societal roles played by the two.

CONCLUSION

Neither Gannett in its brief, nor the *Times* in this brief, has taken the position that courtrooms may never be closed —at or before trial—consistently with the First Amendment. There are long-recognized exceptions to the principle of open courtrooms that are simply not at issue here.*

What is at issue is whether the closing of pretrial courtroom hearings in criminal cases is to become the national norm and not the exception, whether there is to be a strong legal presumption in favor of such action or against it. In New York, as a result of this case, courtrooms are now all but routinely closed at the request of defendants during their pretrial stages. We do not believe the Constitution permits such a result.

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* Recognized purposes which may be served by the exclusion of certain members of the public are preserving courtroom order, *United States* v. *Kobli, supra,* 172 F.2d at 922; *United States ex rel. Orlando* v. *Fay,* 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied,* 384 U.S. 1008 (1966); *Davis* v. *United States,* 247 F. 394, 395 (8th Cir. 1917); insuring the safety of the witness and parties, *United States ex rel. Smallwood* v. *LaValle,* 377 F.Supp. 1148 (E.D.N.Y.), *aff'd,* 508 F.2d 837 (2d Cir. 1974), *cert. denied,* 421 U.S. 920 (1975); *People* v. *Devine,* 80 Misc.2d 641, 364 N.Y.S.2d 71 (Sup.Ct. Kings Co. 1974); *People* v. *Hinton, supra,* 31 N.Y.2d at 73-76, 286 N.E.2d at 266-67, 334 N.Y.S.2d at 887-89; *People* v. *Hagan,* 24 N.Y.2d 395, 397-99, 248 N.E.2d 588, 590, 300 N.Y.S.2d 835, 837-38, *cert. denied,* 396 U.S. 886 (1969); *United States ex rel. Bruno* v. *Herold,* 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied,* 397 U.S. 957 (1970); and protecting the morals of the public, *United States* v. *Kobli, supra. See also United States* v. *Lopez, supra,* 328 F.Supp. at 1087-88. These exceptions, however, are carefully defined and must be sparingly applied. As the Court of Appeals for the Third Circuit has concluded:

> "It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." *United States ex rel. Bennett* v. *Rundle, supra,* 419 F.2d at 607.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-1301

GANNETT CO., INC., *Petitioner*,

v.

THE HONORABLE DANIEL A. DEPASQUALE, AS JUDGE OF THE SENECA COUNTY COURT, ET AL., *Respondents*.

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION and AMERICAN SOCIETY OF NEWSPAPER EDITORS

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IN THE

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GANNETT CO., INC., *Petitioner,*

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THE HONORABLE DANIEL A. DEPASQUALE, AS JUDGE OF THE SENECA COUNTY COURT, ET AL., *Respondents.*

BRIEF AMICI CURIAE
OF
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
and
AMERICAN SOCIETY OF NEWSPAPER EDITORS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association and American Society of Newspaper Editors submit this brief *amici curiae* in support of Petitioner, Gannett Co., Inc. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The American Newspaper Publishers Association ("ANPA") is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1290 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. Twenty daily or weekly newspapers owned by Gannett Co., Inc., as well as forty-five other newspapers in the State of New York, hold membership in ANPA. In representing its membership, one of ANPA's principal functions is to speak out on issues and cases that may adversely affect the primary role of newspapers, which is the gathering of information and its dissemination to the public, particularly information concerning the criminal justice system and other governmental activities.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

In light of their concern with preserving "a broadly defined freedom of the press [which] assures the maintenance of our political system and an open

society." *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967), ANPA and ASNE are greatly disturbed over the majority opinion of the New York Court of Appeals below. That opinion may serve as precedent for the routine use of secret pretrial proceedings in the State of New York, in utter disregard of the fact that "[c]ommentary and reporting on the criminal justice system is at the core of First Amendment values . . . ." *Nebraska Press Ass'n.* v. *Stewart,* 427 U.S. 539, 587 (Brennan, J., concurring opinion).

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Your *amici* adopt the questions presented, constitutional provisions involved and the statement of the case, as set forth in the brief of Gannett Co., Inc.

CLOSURE OF PRE-TRIAL JUDICIAL PROCEEDINGS STRIKES AT THE HEART OF THE FUNDAMENTAL RIGHT OF THE PUBLIC TO RECEIVE, AND OF THE PRESS TO GATHER AND DISSEMINATE, NEWS CONCERNING THE CONDUCT OF GOVERNMENT

In the interest of safeguarding defendants' Sixth Amendment right to a fair trial, Judge DePasquale barred the press and public from attending a pretrial *Huntley* hearing, upon his finding that "[c]ertain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants . . . ." This order barring attendance at a judicial proceeding by the press and public raises a serious "confrontation between prior restraint imposed to protect one vital constitutional guarantee [i.e., the Sixth Amendment guarantee of trial before an impartial jury] and the explicit command of [the First Amendment] that the freedom to speak and

publish shall not be abridged," *Nebraska Press Ass'n* v. *Stuart, supra,* at 570, and "the problems presented by this [confrontation] are almost as old as the Republic." *Id.* at 547.

Although "the right to speak and publish does not carry with it the unrestrained right to gather information," *Zemel* v. *Rusk,* 381 U.S. 1, 17 (1965), the right of the public and news media to attend criminal proceedings is clearly embraced within the protections of the First and Sixth Amendments and may be overborne only in the most exigent circumstances. Broadly speaking, First Amendment considerations apply to the closure of judicial proceedings because "a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). There exists a "paramount public interest in a free flow of information to the people concerning public officials," *Garrison* v. *Louisiana,* 379 U.S. 64, 77 (1964), and governmental processes. Beyond that, the right to observe and report to the public on criminal judicial proceedings also serves to improve the quality of testimony and provide "an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948).

The improvement of testimony resulting from contemporaneous public scrutiny of judicial proceedings is achieved "by producing in a witness' mind a disinclination to falsify and . . . by securing the presence of other non-parties who may be able to furnish testimony to contradict falsifiers." *United States* v. *American Radiator and Standard San. Corp.,* 274 F.

Supp. 790, 794 (W.D.Pa. 1967), *aff'd* 388 F.2d 201 (3rd Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).[1]

In terms of its protection against the abuse of judicial power, the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966).

> "For example, disclosure of the circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargain proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice . . . ." *Nebraska Press Ass'n.* v. *Stuart, supra,* at 605-606 (Brennan, J., concurring opinion); see also, *In Re Oliver,* 333 U.S. 527, 267-270 (1948); *United States ex rel Bennett* v. *Rundle,* 419 F.2d 599, 606 (3rd Cir. 1969).

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[1] As stated by Blackstone in 1778:

> "This open examination of the witnesses, 'viva voce', in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where the witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." Commentaries III, at 768.

Thus, "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions * * * are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975). It is for that reason, therefore, that except in the most exigent circumstance a court has no power to "suppress, edit or censor events which transpire in proceedings before it." *Craig* v. *Harney,* 331 U.S. 367, 374 (1947).

THE RIGHT TO OBSERVE JUDICIAL PROCEEDINGS, ARISING UNDER THE FIRST AMENDMENT AND COMMON LAW, MAY NOT BE OVERBORNE SIMPLY UPON A DEFENDANT'S WAIVER OF HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL

Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This guarantee of a public trial in criminal prosecutions is a fundamental protection in our scheme of constitutional liberties.

> "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in state constitutions in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, . . . most of the original states and

> those subsequently admitted to the Union adopted similar constitutional provisions.
>
> * * *
>
> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In Re Oliver, supra,* at 267-268, 270.

Thus, the guarantee of a public trial found in the Sixth Amendment provision is a reflection of the notion, deeply rooted in the common law, that "justice must satisfy the appearance of justice," *Levine* v. *United States,* 362 U.S. 610, 616 (1960), quoting *Offutt* v. *United States,* 348 U.S. 11, 14 (1954). See also, *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 920 (1950). Yet in the instant cause of action it is necessary to determine whether the provision for a public trial is merely a guarantee of an individual right, which therefore may be waived by the individual, or whether the societal interests served by the Sixth Amendment guarantee survive, and compel a public trial, in the face of an attempted waiver by the defendants.

There is no doubt that important societal goals are served by public trials. As already discussed, public trials improve the prospects of obtaining the truth by allowing witnesses unknown to the parties to come forward and testify, and by moving the court, parties and witness "more strongly . . . to a strict conscientiousness in the performance of duty." 6 J Wigmore,

Evidence in Trials at Common Law § 1834 at 438. The guarantee of a public trial also enables the public to learn about the operation of their government and acquire necessary trust and confidence in judicial determinations:

> "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Id.* (footnote omitted).

For conducting trials outside public view, even at a defendant's request, "might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes." *United States* v. *Lopez,* 328 F.Supp. 1077, 1087 (E.D.N.Y. 1971) See also, *United States* v. *Mitchell,* 386 F.Supp. 639, 642-43 (D.D.C. 1975).

This notion of preserving public confidence in judicial decisions by requiring public trials does not rest on the paternalistic assumption that, in spite of a defendant's expressed desire to waive public trial in the fact of potentially prejudicial pretrial publicity, only public scrutiny can assure that defendant fair treatment before the court.

For

> "[i]t may be witnesses or non-parties whom the judge abuses, ... Or it may be the defendant himself who is the beneficiary of the misdeeds of a biased or corrupt judge: 'for a secret trial can result in favor to as well as unjust prosecution of a defendant.' *Lewis* v. *Payton,* 352 F.2d 791, 792 (4th Cir. 1965). Thus a defendant may have great incentive, to secure a secret hearing in hopes that a corrupt or incompetent judge might favor him secretly." *United States* v. *Cianfrani,* 573 F.2d 835, 853 (3rd Cir. 1978).

It therefore is evident that there exists a common law public policy in favor of open proceedings which is distinct from the Sixth Amendment right of the accused. In certain circumstances that policy, which is primarily designed to assure the effectiveness of the trial process, may actually be antagonistic to the wishes of a particular defendant.

> "The defendant may not be concerned with the same aspects of police conduct that concern the public, *or he may even seek to conceal police misdeeds favorable to his own case. It is thus important that the public's interest in learning of official conduct not be overlooked in accommodating the defendant's asserted interest in a closed proceeding." Id.* (emphasis added): c.f., *Stamicarbon, N.V.* v. *American Cyanimid Co.,* 506 F.2d 532, at 539 (2d Cir. 1974).

It is the particular balance struck by the lower courts in seeking to achieve this accommodation between the First and Sixth Amendment rights of the public and the news media and the Sixth Amendment rights of the defendant, which mandates reversal of their rulings by this Court on constitutional grounds.

THE STATED BASES FOR THE TRIAL COURT'S ORDER CLOSING THE PRE-TRIAL PROCEEDINGS, AND FOR THE NEW YORK COURT OF APPEALS' AFFIRMANCE THEREOF, ACCORD INSUFFICIENT WEIGHT TO THE FIRST AMENDMENT VALUES AT STAKE, AND SAID ORDER IS THEREFORE CLEARLY ERRONEOUS UNDER THE DECISIONAL AUTHORITIES OF THIS COURT

It has been said that "[t]he constitutional right to a public trial is not a limitless imperative." *Lacaze*

v. *United States,* 391 F.2d 416, at 521 (5th Cir. 1968), and that "it is clearly not an absolute right." *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272, 1274 (2nd Cir. 1975). In light of that view, the exclusion of the public—on occasion, even over the express objection of the defendant—has been found in certain circumstances to be constitutionally acceptable. See, *e.g., United States* v. *Bell,* 464 F.2d 667, (2nd Cir. 1972) *cert. denied,* 409 U.S. 991 (1972) (public temporarily excluded during discussion of airline's confidential "skyjack profiles"); *United States ex rel Bruno* v. *Herold,* 408 F.2d 125 (2nd Cir. 1969), *cert denied,* 397 U.S. 957 (1970) and *United States ex rel. Orlando* v. *Fay,* 350 F.2d 967, 971 (2nd Cir. 1965), *cert. denied sub nom Orlando* v. *Follette,* 384 U.S. 1008 (1965) (spectators removed to avoid intimidation and harassment of witnesses); *Geise* v. *United States,* 262 F.2d 151 (9th Cir. 1958), *cert. denied,* 361 U.S. 842 (1959) (spectators excluded from rape trial where their presence would inhibit the testimony of prosecutive and other witnesses of young age); *United States ex rel Lloyd* v. *Vincent, supra* and *People* v. *Hinton,* 31 N.Y. 2d 71, 75, 334 N.Y.S.2d 885, 889, 296 N.E.2d 265 (1972), *cert. denied,* 410 U.S. 911 (1973) (exclusion to protect against disclosure of identity of undercover police agents); *United States ex rel Smallwood* v. *Lavalle,* 377 F.Supp. 1148 (E.D.N.Y.), aff'd 508 F.2d 837 (2nd Cir. 1974), *cert. denied,* 412 U.S. 920 (1975) (exclusion to protect against emotional distress to witness, a young expectant mother). See generally, Annot., Exclusion of Public During Criminal Trial, 156 A.L.R. 265 (1945); *id.,* 48 A.L.R.2d 1436

(1956). Nevertheless, these cases do not serve as precedent or authority for the automatic closure of proceedings at the behest of a criminal defendant. Although the right of defendants Greathouse and Jones to a fair trial before an impartial jury—"a basic requirement of due process," *In re Murchison,* 349 U.S. 133, 136 (1955)—is at least as precious as the interests served by exclusion of the public in the foregoing cases, Respondent DePasquale and the New York State Court of Appeals have misconstrued the showing of practical and compelling necessity required to justify such a procedure.

It is a general proposition of constitutional law that governmental activity which limits the traditional exercise of First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); see also, *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). Any judicial order restricting the press and public in their right to "report fully and accurately the proceedings of government . . . and to bring to bear the benefits of public scrutiny upon the administration of justice," *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975) therefore faces a very high burden of justification. Specifically, an order foreclosing both public and press attendance at presumptively open judicial proceedings may issue only upon: 1) a showing that public and press attendance will result in the dissemination of information which will pose a "serious and imminent threat of interference with a fair trial," *Chicago Council of Lawyers* v. *Bauer,*

522 F.2d 242, 255 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976), or a "clear and present danger to the fairness of a trial," ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press* § 3.2 (Approved Draft, February, 1978); 2) a substantial and specific factual showing thereof, i.e., evidence with "the requisite degree of certainty to justify restraint," *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 568-570 (1976); and 3) a similarly explicit showing that the "judicial effect of such information on potential jurors cannot be avoided by alternative means [including] (a) voluntary agreement with representatives of the news media; (b) continuance; (c) severance; (d) change of venue; (e) change of venire; (f) voir dire; (g) additional peremptory challenges; (h) sequestration of the jury; and (i) admonition to the jury." ABA *Standards Relating to Fair Trial and Free Press, supra;* see also, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Nebraska Press Ass'n* v. *Stuart, supra.* And finally, even if an exclusion order is permissible, it "must extend no further than the circumstances strictly warrant in order to meet the asserted justification for closure. *United States* v. *Ruiz-Estrella,* 481 F.2d 723, 725 (2nd Cir. 1973)." *United States* v. *Cianfrani,* 573 F.2d 835, 854 (3rd Cir. 1978).

Respondents have sought to obviate these standards by arguing a) that "[t]his case does not concern the right of the press to publish" but rather the lesser "right of press access to information," Brief for Respondents in Opposition to petition for Writ of Certiorari, at 8; b) that First Amendment values notwithstanding, "[t]he court maintains its inherent power to protect the rights of parties and witnesses

. . . ." *id.* at 9; and c) that Judge DePasquale was "not presiding over a trial on the merits." Petition for Writ of Ceritorari at 8a. None of these factors, we respectfully submit, justify either the trial court's failure to proceed on the basis of an explicit factual showing of a clear and present danger to a fair trial, or its failure to address diligently the adequacy of alternative, less drastic remedial measures.

Information gathering is clearly entitled to variable degrees of constitutional protection. See, *e.g., Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972); *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974). This protection necessarily complements that protection accorded the public under the First Amendment to receive information and ideas. See, *e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 756 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977); *N. Y. Times Co.* v. *Sullivan,* 376 U.S. 254, 266-270 (1964); *Stanley* v. *Georgia,* 394 U.S. 557 (1969).[2]

It very logically has been stated that "[w]ithout the opportunity to gather and obtain the news, the

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[2] It cannot be said that the issue of press access to presumptively open judicial proceedings is resolved by the majority holding in *Houchens* v. *KQED, Inc.,* 46 U.S.L.W. 4830 (1978). Petitioners do not claim "a right of access to all sources of information within governmental control," 46 U.S.L.W. at 4832, nor do "[t]hey argue for an implied special right of access," *id.* at 4831, over and above that of the public. Moreover, neither criminal trials nor "pretrial" evidentiary suppression hearings constitute "occasions when governmental activity may properly be carried on in complete secrecy," 46 U.S.L.W. 4838 (Stevens, J. dissenting opinion), as in the case of "grand jury proceedings, [this court's] own conferences [and] the meetings of other official bodies gathering in executive session. . . ." *Branzburg* v. *Hayes,* 408 U.S. at 684.

right to publish or to comment upon it would be of little value." *Kovach* v. *Maddux,* 238 F.Supp. 835, 839 (M.D. Tenn. 1965). Although the precise extent of the public's right to receive information, and of the media's right to gather information, has not been defined, it is apparent that these two rights, when coupled with the common law Sixth Amendment right of the public to open judicial proceedings, are fundamental in nature and raise a very high barrier to affirmance of an order excluding all the public and news media from the entire proceeding in a pre-trial *Huntley* hearing.[3]

The artificiality of distinguishing in this context between restrictions on publication (*i.e.,* "gag" orders) and restrictions on access is underscored, not rebutted, by the fact that the strict standards approved in *Nebraska Press Ass'n* applied to prior restraints on publication. For the harmful impact of an order barring the attendance at criminal proceedings of both press and public, insofar as it forecloses the practical exercise of our First Amendment right to gather, disseminate and receive information about the conduct of public affairs, is even greater than that of a narrowly circumscribed order restraining publica-

[3] Nor can such a barrier be overcome merely by the court's undertaking to supply to the public or media at a later date a transcript of the proceedings.

> "[A] transcript of a proceding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the demeanor, voice, and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to jurors during trials." *State ex rel. Dayton Newspaper, Inc.* v. *Phillips,* 46 Ohio St. 2d 457, 451 N.E.2d 127, 136 (1976) (Stern, J. concurring).

tion. In the case of closure, *no information* concerning what transpired in the proceedings—whether it "may be prejudicial to the defendant"[4] or not—can be disseminated. A closure order therefore may be more restrictive of available information than a gag order. Thus, it is sophistry to characterize a closure order as a lesser, indirect restraint vis-a-vis a gag order. By directly and completely restraining attendance at pre-trial proceedings, knowledgeable publication as to what transpired at such proceedings also is restrained, *in toto.* Therefore the strict standards for the imposition of a gag order, as formulated in *Nebraska Press Ass'n, supra,* at 562-567, 571, apply with at least equal force to the closure order below.

"It must be realized that the use of closed proceedings has the capacity to subvert [by circumvention] the entire effect"[5] of decisions barring or limiting the imposition of gag orders. And decisions such as that of the New York Court of Appeals below can only serve as a signal to judges who do not understand or agree with the rationale and restrictions of *Nebraska Press Ass'n,* that different means may be utilized to achieve the same ends. See, *e.g., Philadelphia Newspapers* v. *Jerome,* —— A.2d ——, 3 Med. L. Rptr. 1751 (Pa. 1978); *New York* v. *Berkowitz,* 406 N.Y.S.2d 699, 3 Med. L. Rptr. 2309 (1978).

Nor may constitutional protections be nullified merely because a court, in ordering closure of proceedings, may be exercising its "implied and inher-

[4] Exclusionary Order of Seneca County Court, dated November 4, 1976, at Petition for Writ of Certiorari, p. 31a.

[5] *New Jersey* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977).

ent" powers. See generally, *Green* v. *United States,* 356 U.S. 165, 193-194 (1958) (Black, J., dissenting opinion); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 451 (1911); "Protective Orders Against the Press and the Inherent Power of the Courts," 87 Yale Law Journal, 342 (Dec. 1977). As noted by the California Court of Appeals:

> "The necessity for [implied and inherent] powers is well recognized . . . . At the same time, we must recognize that the concept of implied and inherent powers poses great dangers when, of necessity, their definition and application is in the hands of those who wield them . . . . If, through lack of restraint and by attempting to increase their powers unnecessarily, they lose the respect which makes them effective, they may soon find that, as a practicable matter, even powers that are now conceded to them, are unenforceable." *Younger* v. *Smith,* 30 Cal. App. 3d 138, 156, 106 Cal. Rptr. 224, 237 (1973).[6]

Thus, although dictum in *Branzburg* v. *Hayes, supra,* suggests that a defendant's Sixth Amendment right to a fair trial before an impartial jury may in certain circumstances be a sufficient basis for the closure of trial or pretrial proceedings, the public's common law and constitutional right to attend and to receive information from the press about judicial hearings clearly may not be overborne, even in the exercise of a court's "inherent powers," without a sufficient

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[6] In discussing a trial court's inherent power to cite contempt by publication, this Court has held:

> "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire . . . before it." *Craig* v. *Harney,* 331 U.S. 367, 374 (1947).

showing of necessity. The question herein is not one of judicial authority, but rather whether the procedures and conditions under which a closure order may *properly be issued* have been met in the proceedings below.

It is impermissible, therefore, to conduct the entire pretrial suppression hearing *in camera* merely upon the fear, unsubstantiated by an adequate evidentiary record, that not to do so "would threaten the impaneling of a constitutionally impartial jury in the county of venue." Petition for Writ of Certiorari at 10a. As stated in another First Amendment context "*undifferentiated fear or apprehension* of disturbance [or of juror prejudice, or other substantive evil] *is not enough to overcome the right to freedom of expression.*" *Tinker* v. *Des Moines Indept. Community School District,* 393 U.S. 503, 508 (1969) (emphasis added). Thus, "any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." *United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599, 607 (3rd Cir. 1969) (en banc).

Even assuming that, in its review of the validity of a trial court's order barring public attendance at a pretrial hearing, this Court may not only consider the character and volume of evidence actually presented by the defense, prosecution, or news media, but also the trial court's personal knowledge "based on common human experience," *Nebraska Press Ass'n, supra* at 563, it is apparent that the lower court's ruling was clearly erroneous.

> "[P]retrial publicity, even if persuasive and concentrated, cannot be regarded as leading auto-

matically . . . to an unfair trial." *Nebraska Press Ass'n* v. *Stuart, supra,* at 554.

Moreover, this Court's holdings in *Irvin* v. *Dowd,* 366 U.S. 717 (1961), *Rideau* v. *Louisiana,* 373 U.S. 723 (1963), *Estes* v. *Texas,* 381 U.S. 532 (1965), and *Sheppard* v. *Maxwell, supra,*

> "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior conviction or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy* v. *Florida,* 421 U.S. 794, 799 (1975).[7]

At the time of closure in the instant case, it already was known what the purpose of the *Huntley* hearing was—to suppress inculpatory prejudicial statements (i.e., admissions or confessions) made by the defendants. Moreover, there was no evidence proferred to demonstrate that the detailed contents of the incriminatory statements would be revealed at the hearing, see *U.S.* v. *Cianfrani, supra* at 39-40, or that such contents would necessarily have been published. See, *Nebraska Press Ass'n, supra,* at 612-613

[7] The so-called "federal supervisory standard" for impermissible "inherent prejudice" developed in *Marshall* v. *United States,* 360 U.S. 310, 313 (1959) does not apply in state cases. See *Murphy* v. *Florida, supra,* at 804. And at least one federal court has held that standard to be inapplicable to federal cases involving pretrial, as opposed to during-trial, publicity. See, *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 53 L.Ed.2d 250 (1977). This Court's holdings in *Sheppard* v. *Maxwell, supra,* and *Estes* v. *Texas, supra,* are inapposite, for those cases involved both massive, nationwide publicity and demonstrable havoc (a "carnival atmosphere", *Sheppard, supra* at 618) created by the press' presence in the courtroom.

(Brennan, J., concurring opinion). Nor did the evidence establish "that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a jury verdict exclusively on the evidence presented in open court." *Nebraska Press Ass'n, supra,* at 569. It simply cannot be said—particularly since there weren't any findings made by the trial court in this regard—that alternatives to closure "would not have sufficiently mitigated the adverse effects of pretrial publicity." *Id.,*[8] see also, *New York Times Co.* v. *Stackey,* 380 N.Y.S.2d 239 (1976). Mere judicial conclusions as to these questions do not suffice. See e.g., *Nebraska Press Ass'n, supra,* at 563, 565, 693; *Wood* v. *Georgia,* 370 U.S. 375, 386, 388 (1962).

Finally, it is specious to suggest that, because Petitioner and other members of the public were excluded from a pretrial evidentiary hearing rather than a full-fledged trial, a lesser and tolerable in-

[8] It simply is bad law to say, as respondents do, that "no defendant should have to request continuances until the prejudice . . . can, perhaps, be dissipated" or "be forced to incur the expense, inconvenience, and perhaps loss of witness that a three hundred mile change of venue would entail." Brief for Respondents In Opposition [To Petition for Writ of Certiorari], at 11. These are precisely the "less drastic measures" which, if efficacious in reducing the immediate threat of juror prejudice, must be utilized in preference to judicial orders "gagging" the press or closing judicial proceedings to the public. See, *Sheppard* v. *Maxwell, supra,* at 363; *Estes* v. *Texas, supra,* at 550-551; *Nebraska Press Ass'n, supra,* at 563-564, 572-573; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips,* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); ABA Adjunct Committee on Fair Trial and Free Press § 3.2 (Approved Draft, February, 1978).

fringement of First Amendment freedoms occurred.[9] A very substantial number of criminal proceedings, including that against Jones and Greathouse, are resolved on the basis of the court's rulings in suppression hearings and thereby terminate short of trial.[10] Thus, a suppression hearing is, in a sense, "adjudicative," and although it ordinarily is preliminary to the trial, it is not merely procedural nor is it peripheral to the outcome of the criminal case. It

> "differs strongly from those incidental or collateral discussions outside the presence of the jury which occur during a trial, at which it has been held the public may be excluded, such as a discussion regarding the appointment of counsel for an indigent defendant, or a side-bar conference regarding a question of law or motions for severance and bail, or conferences in chambers or other matters not properly for the jury.
>
> A [suppression of evidence] hearing has more of the characteristics of a testimonial hearing, which is the essence of a trial proceeding, than does the selection of a jury, which we held in *United States* v. *Kobli,* 172 F.2d 919 (3rd Cir. 1949) to be part of a public trial . . . . Such a hearing, with conflicting credibility in issue and factual findings of the judge the ultimate outcome, is in every respect equivalent to a trial proceeding, except that the jury necessarily is excluded from

[9] "[W]e know of no authority for the proposition that First Amendment standards may be 'tempered' according to the degree of the restraint imposed." *United States* v. *CBS, Inc.*, 497 F.2d 102, 105 (3rd Cir. 1974).

[10] See, *e.g., United States* v. *Clark,* 475 F.2d 240, 247 (2nd Cir. 1973).

> it . . . ." *United States ex rel. Bennett* v. *Rundle, supra.*[11]

Thus,

> "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned, the right of a public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy." *United tSates* v. *Clark,* 475 F.2d 240, 247 (2d Cir. 1973) (citations omitted).

[11] Aside from the functional and procedural similarities between a suppression hearing and a criminal trial, the same fundamental public policies served by the Sixth Amendment requirement of a public trial are also served by conducting suppression hearings in public:

> "The policy aspects of the constitutional guarantee have significant application in the unique situation presented by a *Jackson* v. *Denno* hearing. It is especially important to have public knowledge of claims of police coercion or disregard of the constitutional rights to silence and to the assistance of counsel. It is equally important that the testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign, should not be given in secret. Thus the desirability of the public exposure of the claims and denials of coerced confessions, the policy that judicial proceedings be under the scrutiny of the general public in order to avoid judicial oppression [or favoritism] and to discourage perjury, and the provision for the possibility that one who has valuable information might stray into the courtroom as a spectator and hear the proceeding, all are relevant to a *Jackson* v. *Denno* hearing as to a full trial. From the conclusion it follows that such a hearing falls within the constitutional requirement that in criminal prosecutions all trials should be public." *U.S. ex rel. Bennett, supra,* at 606.

CONCLUSION

There may be instances when a judicial order barring public attendance at portions of trial or pre-trial proceedings is permissible. Yet the Constitutional hurdles to the entry of such an order, even when closure is requested by a criminal defendant, are formidable. The trial court, in the exercise below of its authority in this area, clearly ignored the required substantive and procedural safeguards set forth by this Court in *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976). If upheld, Respondent DePasquale's order could lead to the routine and automatic closure of judicial proceedings whenever there is a mere assertion of potential prejudice to juror impartiality resulting from the public's knowledge of or exposure to the evidence and testimony adduced in such proceedings. This could erect a shield for judicial or prosecutorial favoritism and corruption; moreover, it could provide a basis for revival of the abuses formerly associated with the *Star Chamber* and recently displayed in the Soviet trials of Russian dissidents such as Anatoli Shcharansky and Alexander Ginzburg. The mere spectre of such abuse demands scrupulous judicial restraint in this regard and mandates reversal of the New York State Court of Appeals.

Respectfully submitted,

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No. 77-1301

GANNETT COMPANY, INC.,
Petitioner,

v.

THE HON. DANIEL A. DE PASQUALE, *et al.*,
Respondents.

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IN THE

Supreme Court of the United States

No. 77-1301

GANNETT COMPANY, INC.,

Petitioner,

v.

THE HON. DANIEL A. DE PASQUALE, *et al.*,

Respondents.

Brief Amici Curiae of

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

THE NATIONAL ASSOCIATION OF BROADCASTERS

In Support of Petitioner

INTRODUCTION

This case poses a critical question: do the First and Sixth Amendments to the United States Constitution permit trial judges to seal off from the public and the press post-indictment proceedings prior to the opening of the trial – without any notice or effective hearing and without presenting any specific showing of a clear and present danger to the administration of justice. Amici believe that no more important ques-

tion has been presented to this Court concerning public accountability of the judiciary since *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

The rule enunciated by the New York Court of Appeals limiting press and public access to pretrial proceedings, if not reversed, would have a significant public impact, because approximately ninety percent of all criminal indictments in this country are settled prior to the formal opening of the trial. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime 134 (1967). Thus, the rule would in effect give trial judges the broad discretionary power to seal off, virtually at will, their activities in nine out of every ten criminal cases which pass through the state court systems.

Moreover, it is not only judges' conduct which would be hidden from public scrutiny. Many pretrial proceedings raise critical legal issues as to whether constitutional standards have been respected by the prosecution and the police – for example, in obtaining confessions, in issuing search warrants for the seizure of evidence, in making arrests and issuing arrest warrants, in using informers, in placing wiretaps, and in conducting plea bargaining.

Because there is no trial in ninety percent of the criminal cases, the pretrial proceeding may be the only forum for public information about official conduct. Giving politically-appointed or elected trial judges the broad discretionary power to seal these proceedings would in many cases insulate the judiciary, the prosecution and the police from any meaningful public accountability. It would encourage the type of political corruption prevalent in the state judiciaries prior to the great reform movement led by the late Chief Justice Vanderbilt of New Jersey. It would exacerbate partisan political pressure on the judicial branch – the branch that has always been the most open, and therefore the most trusted, branch of our government.

As a result, the judiciary would become more vulnerable to money, ambition, votes and all the considerations so alien to the fair administration of justice.

Amici submit that the history, philosophy and common practices of the American courts before, and immediately after the drafting of the Sixth Amendment establish that the Framers of the Constitution, in drafting the Sixth Amendment, adopted the established principle that the public and the press have a vested right to attend *all* post-indictment stages of criminal proceedings.

Based on the history and development of the Sixth Amendment and on the significant and adverse impact of a pretrial secrecy rule, Amici contend that the public and the press have a vested constitutional right to attend all stages of post-indictment proceedings; and, furthermore, that such a right can only be limited if (a) there is convincing evidence that attendance by the public and the press will "pose a serious and imminent threat of interference with a fair trial,"[1] and (b) there are no possible alternatives, such as a change of venue or close questioning of jurors. In other words, the standards applied in *Nebraska Press Ass'n v. Stuart, supra,* should be applied here – and for the same reasons.

This brief will be limited to these issues.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public to know

[1] Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

about the operation of all forms of government, through its press.

The interest of the Reporters Committee in the constitutionality of orders restricting public information about the courts is well known to this Court, as it has appeared before this Court in virtually every recent case challenging restrictions on the collection and publication of information about court proceedings, including:

* *Dickinson v. United States*, 414 U.S. 979 (1973), *cert. denied;*
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974), stay granted;
* *Times-Picayune Publishing Corp. v. Schulingkamp*, 420 U.S. 985 (1975), dismissed as moot;
* *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975), stay denied;
* *Nebraska Press Ass'n. v. Stuart, supra;*
* *Central South Carolina Chapter, Society of Professional Journalists v. Martin*, 46 U.S.L.W. 3437 (U.S. January 9, 1978); *cert. denied*, and
* *Gannett Co., Inc. v. DePasquale* (in support of the Petition for a Writ of Certiorari), 46 U.S.L.W. 3679 (U.S. May 1, 1978), *cert. granted.*

The Committee is primarily supported by press donations and relies heavily on volunteer efforts to conduct its activities – such as this brief which is a *pro bono publico* effort by Attorneys for Amici aided by law student interns Lee Helfrich (American University Law School), Steven Helle (University of Iowa College of Law) and

Shelley Steuer (University of California at Los Angeles Law School).

The National Association of Broadcasters represents more than 5000 commercial broadcasting outlets in the United States. The Association has long been active in protecting the First Amendment and public information interests of the broadcast press. It enters amicus curiae in this case because it believes that the decision of the New York Court of Appeals, if not reversed, will substantially undermine the rights of the public and the press to monitor the judicial process.

The Reporters Committee for Freedom of the Press and the National Association of Broadcasters submit this brief *amici curiae* in support of the Petitioner Gannett Company, Inc., with the consents of the Petitioner and Respondents (see Appendix A).

QUESTION PRESENTED

May the public and the press, consistent with the First and Sixth Amendments to the United States Constitution, be ejected from traditionally public pretrial hearings whenever a trial judge – without any supporting evidence – believes that publication of truthful statements concerning the hearing may threaten the right of a defendant to an impartial jury and

a. when the history of the Sixth Amendment clearly shows that the Framers of the Constitution and the post-Constitutional courts believed that the public had an absolute right to attend all pretrial hearings; and

b. when the contemporaneous impact of pretrial secrecy would be to forego effective public scrutiny of the conduct of prosecutors, judges and police officers in nine out of every ten criminal cases in the state trial systems?

STATEMENT OF THE CASE

The Amici synopsize the statement of facts as follows:

Wayne Clapp, a former Brighton, New York, town policeman, was reported missing in July 1976. The week after his disappearance, Michigan police arrested three young people in the missing policeman's truck – a 16-year-old Texas youth, Kyle Greathouse, his 21-year-old companion, David Jones, and a young woman.

News reports said that Greathouse had led Michigan authorities to the location where he had buried a stolen revolver and that both Greathouse and Jones had made confessions before waiving their extradition to New York. The two were indicted by a Seneca County grand jury on charges

of murder and robbery; they pleaded innocent. (The young woman was not prosecuted.)

A pretrial hearing was begun before Respondent Judge Daniel A. DePasquale. Pursuant to a motion by the defense attorney, the hearing on the question of whether the alleged confessions should be admitted into evidence in the upcoming trial was held in secret, on the ground that certain evidence might be revealed which could be "prejudicial" to the defendants' rights to obtain an impartial jury. (Brief of Petitioner at 4.)

Petitioner, the Gannett Company, the owner of a number of newspapers, opposed the secret hearing, claiming it violated First Amendment rights to cover judicial proceedings. Because the hearing was over, Petitioner requested a copy of the transcript. The trial judge refused to provide the transcript, finding "a reasonable probability of prejudice" if information from the confession hearing was published.

On appeal, the Appellate Division ruled in Petitioner's favor, finding that a secret hearing was nothing more than a substitute for a prior restraint on the publication of news and that the judge had not provided the necessary compelling reason for censorship.

This decision was appealed to the State's highest court, the New York Court of Appeals, which reversed the Appellate Division and upheld the secrecy order. The Court of Appeals said that "criminal trials are presumptively open to the public, including the press,"[2] but that this was a pretrial proceeding, not a trial, and, therefore, the judge had more discretion to seal the hearing.

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[2] Gannett Co., Inc. v. DePasquale, 401 N.Y.S.2d 756, 759, 42 N.Y.2d 370 (C.A. 1977).

Because the evidence presented in the hearing might be suppressed, the court found that "to allow the disclosure of potentially tainted evidence is to involve the court itself in the illegality" and, therefore, it must be deemed to have the power to avoid becoming "a link in the chain of prejudicial" news.[3]

Thus, the Court of Appeals articulated the following general rule: "At the point where press commentary on those [pretrial] hearings would threaten the impaneling of a constitutionally impartial jury, pretrial evidentiary hearings in this state are presumptively to be closed to the public."[4]

The Court of Appeals further held that trial courts should "afford interested members of the news media an opportunity to be heard * * * to determine the magnitude of any genuine public interest" in the proceedings.[5] If the public interest is "overwhelming," such as in a trial involving "public officials," then the trial judge might wish to keep the proceedings open. The Court of Appeals concluded that public and press interest in the murder case was not based on a "legitimate" interest but was based on "mere curiosity * * * with respect to a notorious local happening."[6]

Judge Lawrence H. Cooke was joined in dissent by Judge Jacob D. Fuchsberg. Recognizing that closed hearings may sometimes be permissible, they nevertheless concluded that

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[3] *Id.* at 762.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 763.

"in this instance invocation of this drastic remedy without notice, without hearing, and without substantiation of a clear and present state necessity, abridged the rights of the press to report true accounts of public proceedings and deprived the public of a free flow of information in which they have a great interest. In the absence of compelling necessity, public scrutiny of the administration of justice and the effectiveness of law enforcement agencies cannot be foreclosed."[7]

Judge Cooke wrote that "the right of free expression must encompass both the freedom to convey information about a public matter and the liberty to gain access to proceedings involving the same" information. "A closed proceeding should be recognized for what it is," he said, "a serious backdoor threat to First Amendment interests."[8] The majority opinion, he believed "lock[s] the courtroom door virtually whenever requested in pretrial hearings."[9]

In March the Gannett Company asked this Court for review by Petition for A Writ of Certiorari. On May 1, 1978, this Court issued the writ. (46 U.S.L.W. 3679 (U.S. May 1, 1978).)

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[7] *Id.*

[8] *Id.* at 765.

[9] *Id.* at 766.

ARGUMENT

I

THE HISTORY, CONTEMPORARY PRACTICE AND COMMON UNDERSTANDING OF THE PUBLIC TRIAL GUARANTEE ESTABLISH THAT THE SIXTH AMENDMENT VESTED IN THE PUBLIC AND THE PRESS AN ALMOST ABSOLUTE RIGHT TO BE PRESENT DURING ALL STAGES OF A CRIMINAL PROCEEDING.

All available historical evidence demonstrates that the Sixth Amendment was intended to vest in the public and the press a right to attend all post-indictment proceedings, even when there is strong evidence that publicity about the proceeding would make it difficult to select an impartial jury. Since words of the Constitution should be interpreted with due regard to the intent of the Framers,[10] Amici believe that the following history of the open trial guarantee will be helpful to the Court.

Closed post-indictment proceedings are inconsistent with the history, philosophy, practice and intent of the public trial guarantee. This conclusion is demonstrated by the history of the public trial guarantee as evidenced by (1) its historical evolution in the colonies and its inclusion in the Constitution; (2) the absence of even a single instance of closed pretrial proceedings in an exhaustive survey of cases in the Commonwealth of Massachusetts from 1760 to 1830; and (3) the express application of the guarantee in a pretrial hearing in the most celebrated criminal trial of the period – the trial of Aaron Burr.

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[10] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 151-153 (1968); In Re Oliver, 333 U.S. 257, 266-271 (1948).

A. The Public Trial Provision Evolved from Well-Established Common Law.

The public trial provision of the United States Constitution has generally been viewed as an outgrowth of the common-law practice that "the trial is always public."[11] A succinct explication of the early philosophy of the provision is offered by one author who examined the common law system of England – the common law system adopted by the colonies:

> [Evidence is given] in the open court, and in the presence of the parties, their attornies, counsel, *and all by-standers*, and before the judge and jury: exceptions [made to competency of evidence or witnesses] are PUBLICLY stated, and by the judges openly and publicly disallowed; – wherein if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers.[12]

The right of the public to attend all judicial proceedings was viewed by American colonists as an essential guarantee, as evidenced by the fact that public trial provisions were contained in several states' charters. For example, the "Concessions and Agreements of West New Jersey" contained the following language:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely

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[11] 3 J. Story, Commentaries on the Constitution of the United States 662 (unabr. rep. 1970) (1st ed. Boston 1883).

[12] M. Hale, The History of the Common Law of England 343-344 (Runnington 6th ed. London 1820) (capitalization in original; emphasis supplied).

> come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner or in any covert manner* ***.[13]

This West New Jersey provision has been viewed as "an important step in the development which culminated in the federal Bill of Rights"[14] and, thus, illuminates the intention of the Sixth Amendment's drafters. Indeed, the Charter provision was described by its own writers as forming "a foundation for after ages to understand their liberty" and representing "the common law of fundamental rights and privileges * * * agreed upon * * * to be the foundation of the government."[15]

The Pennsylvania Frame of Government, drafted in 1682 by William Penn, as well as the latter Pennsylvania Declaration of Rights, provided that "all courts shall be open."[16] Similarly, the Declaration of Rights drafted by Massachusetts and Vermont contained provisions for public court proceedings.[17]

Moreover, none of the charters of the original states mentioned the exclusion of the public from any stage of any judicial proceeding.

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13 Concessions and Agreements of West New Jersey, 1677, *quoted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 125 (1971).

14 1 B. Schwartz, *supra* note 13 at 125.

15 *Id.*

16 Pennsylvania Declaration of Rights, 1776, *quoted in* 1 B. Schwartz, *supra* note 13 at 271.

17 1 B. Schwartz, *supra* note 13 at 323, 372.

In light of the English common law, the charters of New Jersey, Pennsylvania, Massachusetts and Vermont, and the absence of any suggestion to the contrary in basic governing instruments, it must be concluded that the colonists intended to secure for themselves and the generations that would follow a nearly undeniable – if not absolute – right to attend any and all stages of judicial proceedings.

There is no evidence to suggest that the drafters of the Sixth Amendment intended to secure for the people any less extensive a right than that conceived by the drafters of the state charters or accorded by common law. Madison's first proposals to the Congressional Convention contained a public trial provision.[18] That right subsequently became part of the Sixth Amendment in 1791, and most of the original states, as well as those later admitted to the Union, adopted similar provisions in their respective constitutions.[19]

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18 Note, The Rights to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138, 1138 (1966).

19 The Constitution of The United States – Analysis and Interpretation, U.S. Government Printing Office 1199-1200 (1973).

B. The Courts of the Commonwealth of Massachusetts, a strong Common Law Colony and then State, Never Conducted a Judicial Proceeding which Excluded any Member of the Public or the Press Prior to or Immediately After the Adoption of the Sixth Amendment.

An examination of all trials that took place in the Commonwealth of Massachusetts immediately preceding and subsequent to the adoption of the Sixth Amendment provides further evidence that the Founders of our nation intended that the public and the press have a vested right to attend all stages of judicial proceedings.

In what Amici believe is the only exhaustive survey of its kind, a noted legal scholar from the Yale Law School read, with narrow exceptions, every trial that took place in the Commonwealth between 1760 and 1830. In an affidavit (Appendix B), Professor William E. Nelson, author of "The Americanization of the Common Law," states the following:

> During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.
>
> In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.
>
> Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

It certainly must be assumed that sometime between 1791, when the Sixth Amendment was adopted, and 1830, the last year surveyed by Mr. Nelson, there were several cases in the Commonwealth of Massachusetts which generated substantial prejudicial information and political passions. Nonetheless, Mr. Nelson "found no indication" that the press or the public had been excluded from any stage of any judicial proceeding.[20]

These results of Professor Nelson's survey strongly suggest that both the pre- and post-Constitutional periods recognized an absolute right in the public and the press to attend all judicial proceedings.

C. The Aaron Burr Trial Is a Pretrial Case in Point

The most celebrated criminal trial in America's early history is persuasive evidence that the Sixth Amendment guaranteed access of the public and the press to all stages of criminal proceedings – even a proceeding in which the judge was aware that the publicity might deprive the defendant of an impartial jury.

Persons came to Richmond from near and far in 1807 to watch Colonel Aaron Burr's trial for treason, Chief Justice John Marshall presiding. Chief Justice Marshall permitted the proceedings against Burr to remain open to the

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20 Amici understand, of course, that the Sixth Amendment was not then applicable to the states. However, it is the contention of Amici that the common law reflected in state court proceedings is relevant in determining the intent of the Framers.

public and the press at every stage, even before an indictment was handed down by the grand jury. Indeed, one scholar noted that the proceedings were as much a battle to gain public sentiment as to gain a legal verdict.[21] The lawyers spoke to the spectators crowded into the courtroom far more than they did to the bench. And the throng inside the courtroom then repeated their words to the "thousands who could not get into the hall [to hear] what had been said by the advocates."[22]

It is doubtful whether in our post-Constitutional history there has ever been more public sentiment and prejudice stirred up by a single criminal proceeding as that against Burr – who was opposed by Jefferson at his highest peak of "popular idolatry."[23] Albert J. Beveridge, in his classic biography of John Marshall, observed that:

> so vocal and belligerent was the patriotic majority of people who were convinced of Burr's guilt that men who at first held opinion contrary to the prevailing sentiment, or who entertained serious doubt of Burr's guilt, kept discreetly silent. So aggressively hostile was public feeling that, weeks later, when the bearing and manners of Burr, and the devotion, skill, and boldness of his counsel had softened popular asperity, *Marshall declared that, even then, "it would be difficult or dangerous for a jury to venture to acquit Burr, however innocent they might think him"*[24] (emphasis supplied).

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21 A. Beveridge, The Life of John Marshall 421 (1919).

22 *Id.* at 420.

23 *Id.*

24 *Id.* at 401, quoting Blennerhassett Papers: Safford 465. *See id.* at 388-390.

Before the trial began, the chief prosecutor indulged in a tactic designed to prejudice public sentiment. He made a pretrial motion that Burr be kept in custody during the pendency of the trial, expecting Marshall to deny it and thus encourage the Republican press to further criticize Marshall's "leniency" to "traitors."[25] Marshall, however, allowed the prosecutor to present evidence on the motion at a public pretrial proceeding, while soundly criticizing his attempted maneuver to capitalize on the public nature of the proceedings. Marshall said:

> The court perceives and regrets that the result of this motion may be publications unfavorable to the justice, and to the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man, feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecutions, can view, without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artificially excited against the innocent, as well as the guilty.[26]

Marshall did not even hint that closing the pretrial proceeding to the public might be a viable alternative, although he was fully cognizant of the presence of the public and the press, and of their susceptibility to prejudice in a very high degree. But the proceeding – a pretrial proceeding – re-

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25 *Id.* at 423.

26 1 D. Robertson, Reports of the Trials of Colonel Aaron Burr (1808).

mained open. Chief Justice Marshall's adherence to the principle that the public must be permitted to attend even the most prejudicial type of pretrial proceeding was vindicated when the jurors – all of whom had admitted their prejudice against Burr[27] – returned a verdict of acquittal.

D. The Historic Erosion of the Public's Right To Attend Post-Indictment Proceedings Does Not Support the Action of the Court Below.

The favorable predisposition toward openness mandated by the Sixth Amendment continued through the mid-nineteenth century, for as Professor Lieber, whose philosophy has been described as representing the mainstream of nineteenth century thinking,[28] noted in his book, "On Civil Liberty and Self-Government," first published in 1853, "All governments hostile to liberty are hostile to publicitiy * * *."[29]

Beginning around 1880, however, the judiciary began limiting the scope of the public trial guarantee. The Kansas Supreme Court upheld a lower court's order excluding ladies from the audience while obscene testimony was taken.[30] A Texas Court of Appeals approved the exclusion of an audience that had engaged in laughing at a witness's testimony during the course of a rape trial.[31] In one curious case the California Supreme Court validated an order excluding all members of the public except those connected with the case, on the presumption that the appellant had assented,[32] although the court's reasoning was later characterized by the same court as unsound.[33]

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27 3 A. Beveridge, *supra* note 21 at 483.

28 F. Heller, The Sixth Amendment 142 (1951).

29 1 F. Lieber, On Civil Liberty and Self-Government 134 (3d ed. rev. Philadelphia 1874) (1st ed. 1853).

30 State v. McCool, 34 Kan. 617, 9 P. 746 (1886).

31 Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (1886).

Thus, with the advent of large metropolitan areas and the establishment of permanent courts, pretrial proceedings probably became a preferred method for efficiently settling evidentiary and other matters ahead of trial so that the trial itself would not be unduly prolonged. This technique, apparently adopted jointly by the bench and the bar in the name of efficiency, led to the beginning of *in camera* hearings and pretrial proceedings from which the public was excluded.

But curiously, while there were challenges to such exclusions, the challenges never came from members of the public or the press, so that this Court in this case will have its first opportunity squarely to review the question of the press and the public right to attend pretrial proceedings.

Once begun, the trend referred to above toward destroying the open court provision was joined by other courts which found that the right was the defendant's to waive at will,[34] or that there was no reversible error unless prejudice of some form was demonstrated.[35] Some courts upheld exclusion

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32 People v. Swafford, 65 Cal. 223, 3 P. 809 (1884).

33 People v. Hartman, 103 Cal. 242, 37 P. 153 (1894).

34 *See* Benedict v. People, 23 Colo. 126, 46 P. 637 (1896); Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950); People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (1900) (exclusion of general public upheld when defendant could designate friends he wanted to remain).

35 *See* Reagan v. United States, 202 F. 488 (9th Cir. 1913); Clemons v. State, 17 Ala. App. 533, 86 So. 177 (1920). As a practical matter, however, the public trial right would be negated if a

orders without reaching the merits by finding that the defendant failed to object in a timely manner or failed to request that any particular members of the audience be exempted from an exclusion order.[36]

Many courts, however, have maintained a broad view of the public trial guarantee. For example, in *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897),[37] the Michigan Supreme Court ruled unconstitutional a statute that had authorized lower court judges to exclude from courtrooms all parties except members of the press and friends of defendants.

Other courts, adopting the reasoning of *Yeager*, understood that the benefits of the public trial provision inure not only to the defendant[38] but to the public and the judiciary.

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showing of prejudice were required, since it is almost impossible to point to any specific injury due to the absence of an audience. United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). It is also questionable whether the state should oblige the defendant to carry the burden of demonstrating the harm of the state's misconduct. Note, *supra* note 18 at 1149.

36 *See* Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933).

37 *Accord*, United States v. Kobli, *supra* note 35; Davis v. United States, 247 F. 394 (8th Cir. 1917) (per curiam); State v. Wade, 207 Ala. 1, 92 So. 101 (1921); People v. Hartman, 103 Cal. 242, 37 P. 153 (1894); Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918); State v. Hensley, 75 Ohio St. 255, 264, 79 N.E. 462, 464 (1906); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

38 Indeed, there is some question as to whether the public trial provision was initially envisioned as a protection for the defendant. M. Radin, The Right to a Public Trial, 6 Temple L.Q. 381, 383-384 (1932).

Among the bases for decisions supporting complete openness of all trial procedures are that it (1) checks judicial abuse and arbitrariness;[39] (2) discourages false testimony;[40] (3) provides notice of proceedings to witnesses who may have additional information;[41] (4) aids in appraisal of the judicial process;[42] and (5) educates the public and induces greater respect for the judicial process.[43] Decisions like these, grounded on considerations of public policy, establish clearly that the right of the public to attend all stages of a post-indictment proceeding is to be protected, not only as a right of the accused but as a right of the public itself.

Cases that have implemented a broad public policy perspective in interpreting the public trial right have exhibited a more thorough analysis of the purposes contemplated by that right. Typically, courts advocating a narrow view summarily conclude that the exclusion in a given case was within the judge's discretion – a conclusion that could just as easily have been reached in the absence of a Constitutional mandate that trials are to be public. Moreover, many de-

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39 In Re Oliver, 333 U.S. 257, 270 (1948); United States v. Kobli, *supra*, note 35 at 921; People v. Jelke, 308 N.Y. 56, 62, 123 N.E.2d 769, 771-772, 48 A.L.R.2d 1425, 1430 (1954).

40 State v. Schmit, *supra* note 37 at 806-807; People v. Jelke, *supra* note 39, 308 N.Y. at 52, 123 N.E.2d at 772.

41 United States v. Kobli, *supra* note 35 at 921; Tanksley v. United States, *supra* note 35 at 59; State v. Schmit, *supra* note 37 at 807; People v. Jelke, *supra* note 39, 308 N.Y. at 63, 123 N.E.2d at 772.

42 State v. Hensley, *supra* note 37, 75 Ohio St. at 266, 79 N.E. at 463-464; Neal v. State, *supra* note 37, 86 Okla. Crim. at 289, 192 P.2d at 297 (1948).

43 Note, *supra*, note 18 at 1139.

cisions on the merits which upheld the exclusion of members of the public and the press were based on nineteenth century notions of gentility and taste, or on the clearest type of present dangers to court proceedings, such as brawls and disorders in the courtroom. Until very recently, courts have not presumed to challenge Chief Justice Marshall's understanding that even the most highly prejudicial information is an inadequate justification for secret proceedings.[44]

E. Conclusion

For the foregoing reasons, Amici assert that this is not a case of the press seeking to obtain access to information

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[44] *Cf.* Estes v. Texas, 381 U.S. 532 (1965) (implied prejudice to accused warrants exclusion of television cameras); Oliver v. Postel, 30 N.Y.2d 407, 282 N.E.2d 306 (C.A. 1972) (overturning lower court's exclusion order aimed specifically at the news media). As late as 1932, one commentator noted that there was a consensus among the courts on the following limitations on exclusion:

(1) The court need not admit the public beyond the limits of the courtroom's normal capacity. It need not permit the aisles to be crowded or the corridors to be filled so as to prevent orderly ingress and egress.

(2) The court may order the removal of individual spectators whose conduct renders them dangerous or an obstruction to the trial.

(3) The court may exclude most of the public or certain classes of the public, if the testimony is likely to be obscene or offensive.

M. Radin, *supra* note 38 at 390. He added that it was established that courts could not exclude the press, except for personal misconduct. *Id.* at 391.

"[N]o court has gone so far as affirmatively to exclude the press." In re Oliver, 333 U.S. 257, 272 n.29 (1948).

which it has no right to obtain by using the First and Sixth Amendments as "a Freedom of Information Act."[45]

Rather, the opinion of the New York Court of Appeals voids a long-established, well-recognized and vested right in the public and the press under the First and Sixth Amendments to attend and report on all formal court proceedings – a right that should be not eroded by this Court except upon a clear and convincing showing of a serious and imminent threat to the administration of justice in each case in which a secrecy motion is made.

Even if changed circumstances in the news media and in society in general were to convince this Court to be more solicitous of the defendant than Chief Justice Marshall was in the Burr trial, this concern should not be used to destroy the ancient right of the public to demand accountability of the judiciary without clear evidence, in each case, that secrecy is the only alternative available. This Court should not deviate from the line of cases favoring extended public access to information about court proceedings[46] without such a showing.

Amici contend that no such evidence has been presented in the instant case.

It is one thing to hold, as this Court has, that judges are absolutely immune from suit for judicial acts, even when such acts are erroneous, malicious, or in excess of their au-

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[45] Houchins v. KQED, Inc., 46 U.S.L.W. 4830, 4833 (U.S. June 26, 1978).

[46] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941).

thority. *Stump v. Sparkman,* 46 U.S.L.W. 4253 (U.S. March 28, 1978). It is quite another to grant judges the broad authority exercised in this case to perform their judicial acts outside the scrutiny of the public, represented in most cases by the press. The combination of two such rulings would not only invite judicial abuse but cause grave misgivings in the public mind as to how the judicial branch of its government is actually carrying out its duties.

II

CLOSED POST-INDICTMENT PROCEEDINGS INVITE ABUSE BY JUDGES, PROSECUTORS, DEFENSE COUNSEL AND LAW ENFORCEMENT PERSONNEL

A. Trial Judges and Counsel Are Vulnerable to Political Pressure and Thus Require Public Scrutiny.

Politics influences the local and state judiciary to a considerable extent. All of the states and the District of Columbia are committed to some element of electoral review in the selection or retention of judges. Partisan election of judges takes place in fifteen states.[47] In eighteen states trial judges are elected on a non-partisan basis.[48] Ten states favor indirect review by either legislative or gubernatorial appointment.[49] The remaining states use merit selection plans in which an elected government official plays a key role in selecting a judge from a list prepared by an appointed commission.[50] While these selection systems attempt to eliminate

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47 American Judicature Society, Judicial Selection and Retention in the United States: A State-by-State Compilation (rev'd 1978).

48 *Id.*

49 *Id.*

50 *Id.*

partisan politics from the selection process, in fact, politics may directly affect appointments because of its effect on the official with the power to appoint.[51] As a result, public scrutiny of the official acts of the state judiciary is vital to its integrity.

The federal judiciary, too, is affected by partisan politics. In the appointment of federal judges, presidential politics, senatorial courtesy and the patronage system are well-known and documented factors. For the federal judiciary, appointed for life, public scrutiny may be the only effective restraint on potential abuse.

It is well recognized that political motivation can affect the impartiality of judges; this Court implied as much in *Sheppard v. Maxwell,* 384 U.S. 333, 342 (1966):

> The case came on trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge * * * was a candidate to succeed himself.

Moreover, in his book concerning New York City judges, Jack Newfield has documented the role of politics in judicial policymaking.[52] His research shows that politics and political parties play a role in "fixing" cases, motions and appeals.[53] Similarly, this Court has noted the political influences of segregationist politics on trial judges in the South.[54]

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51 Thode, Reporter's Notes to Code of Judicial Conduct 96 (1973).

52 J. Newfield, Cruel and Unusual Justice 81-190 (1974).

53 *Id.* at 127.

54 Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935).

A more recent example of the problems of political corruption in the judiciary is illustrated by the recent indictment of Judge Samuel DeFalco, Surrogate for New York County.[55] The 500-page indictment (which curiously has remained sealed) details an alleged net of corruption, based on political friendships, in connection with the disposition of trusts and estates in New York County.[56]

Amici do not want to be understood as making a blanket indictment of any judicial system, state or federal. We fully recognize that cases of judicial misbehavior are rare indeed. But the point is that so long as there is both the opportunity for improprieties and occasional demonstrations that they do occur, the public must at least have the assurance that it is being kept informed.

Political influence and pressure can also affect another crucial participant in the judicial process – the prosecutor. Prosecutors face the same re-election concerns as other politicians and may even run on the same political ticket as the local trial judge. Since most candidates for new judgeships are former prosecutors,[57] they can be expected to seek the approval of the partisan political establishment to obtain appointment or election to the bench. To ensure such political support, a prosecutor often seeks a high conviction record. Thus, for political reasons, a prosecutor will ordinarily select for trial those cases with a high chance of success[58] and may try to dispose of, or even cover up, cases

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55 People v. DeFalco, Indict. No. 462-78 (New York County Supreme Ct., Feb. 14, 1978).

56 *Id.*

57 President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 148 (1967).

58 McIntyre and Lippman, *Prosecutors and Early Dispositions of Felony Cases*, 36 A.B.A.J. 1154 (1970).

where the probability of conviction is low or the risk of political liability is high.[59]

The principle of public accountability does not stop with participants who are subject directly or indirectly to electoral review. The competency of lawyers themselves has been the subject of a recent controversy sparked, in part, by remarks by the Chief Justice of the United States, in which he suggested that a large number of lawyers who try cases are inadequately trained.[60]

Lawyers, as public officers of the court, play an important role in the administration of justice – particularly lawyers in public defender offices. Politics can affect public defender offices[61] because they are dependent upon public funding by elected officials. Thus, there is always the possibility that the political pressure of the purse could affect a public defender's decisions.

The public has the right to expect that criminal proceedings will be conducted with equality and fairness and that court personnel will perform properly.[62] It is imperative

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59 This Court should take judicial notice of the controversy surrounding the Justice Department during Watergate, and the allegations that the Attorney General and some of his subordinates were less than diligent in their efforts to uncover the identities of the ultimate culprits.

60 Remarks of Chief Justice Burger before American Bar Association, August 9, 1978.

61 Friloux, *Equal Justice Under Law: A Myth Not a Reality*, 12 Am. Crim. L. Rev. 691, 692 (1975).

62 Yankelovich, Skelly and White, Inc., The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders 27 (1978) (prepared for the National Center for State Courts) [hereinafter cited as Yankelovich]. Amici have lodged copies of this survey with the Clerk of the Court.

that all participants in the administration of justice be accountable to the public. Because the judicial process is so intermingled with the political process, Amici believe that to provide the requisite accountability, judges, prosecutors and others involved in the judicial system must be subjected to the broadest public scrutiny.

B. The Public Needs News Reports of Pretrial Proceedings To Exercise Effectively its Franchise in the Election of Judges and its Overview of Appointed Judges.

To participate effectively in the political process, the public needs information concerning governmental officials. This Court has recognized "that a major purpose of [the First] Amendment was to protect free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Judges, especially elected judges, should not be immune from effective public scrutiny. As this Court noted in *Cox Broadcasting, Inc. v. Cohn*, 420 U.S. 469, 495 (1975), "the citizenry is final judge of the proper conduct of public business." More recently, this Court recognized that public exposure of alleged judicial misconduct lies "near the core of the First Amendment." *Landmark Communications, Inc. v. Virginia*, 56 L. Ed. 2d 1, 10 (1978). In *Landmark*, Mr. Chief Justice Burger noted for the Court the importance of public access to information concerning the courts, stating, "The operations of the courts and the judicial conduct of judges are matters of utmost public concern."[63]

However, because of the nature and operations of the judiciary, the public is frequently deprived of complete and

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63 Landmark Communications, Inc. v. Virginia, 56 L.Ed.2d 1, 10.

adequate information concerning the administration of justice.[64] Authorizing judges to close pretrial hearings will decrease the flow of already inadequate information and thereby destroy the public's ability to make effective judicial choices.

One reason for the lack of public information and understanding is the low visibility of the judiciary.[65] Seventy-four percent of the public has little or no familiarity with state courts.[66] Sixty-three percent has little or no familiarity with local courts, and seventy-seven percent has little or no familiarity with federal courts.[67]

Information about the judiciary is desperately needed by the public, as was demonstrated by a recent poll sponsored by the Ford Foundation and discussed on June 7-9, 1978 at a conference in Williamsburg, Virginia, sponsored by the National Center for State Courts. Inadequate information leads to widespread misunderstanding about the judicial process. For example, thirty-seven percent of the public believes that a person accused of a crime must prove his or her innocence.[68] Moreover, lack of adequate information may contribute to public apathy and skepticism about the administration of justice. One out of four people believes that court decisions are primarily affected by political considerations.[69] Of per-

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64 *Cf.* Yankelovich *passim;* Adamany and Dubois, *Electing State Judges*, 1976 Wisc. L. Rev. 731, *passim.*

65 Adamany and Dubois, *supra* note 64 at 771.

66 Yankelovich at 3.

67 *Id.*

68 *Id.* at 1.

69 *Id.* at 35.

sons familiar with the courts, forty-eight percent perceive a great or moderate need for reform.[70] Eighty-eight percent of the people with court experience and eighty-three percent of the people with no court experience believe that efficiency in the courts is a serious problem.[71] Only nineteen percent of the people with court experience and twenty-six percent of those with no court experience are extremely or very confident about the courts.[72] Amici believe that much of this skepticism is due to the low visibility of the judiciary. Closing post-indictment proceedings can only decrease visibility still further and tend to increase public skepticism about our court system.

A significant result of the low visibility of the judiciary is that the public lacks the knowledge to exercise intelligently its voting franchise. Judicial elections are characterized by low levels of information and participation. For example, only one percent of the voters in New York City, Buffalo, and rural Cayuga County could recall the name of the chief judge whom they had reelected.[73] A consumers' organization in New York reported that ninety percent of the people leaving the polls could give no explanation for their vote for a candidate for the bench other than party label, and most had difficulty remembering the name of the candidate for whom they voted.[74] One New York City judge was reelected without opposition soon after he had been indicted on two counts of perjury before a grand jury,

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70 *Id.* at 18.

71 *Id.* at 17.

72 *Id.*

73 Adamany and Dubois, *supra* note 64 at 775.

74 J. Newfield, *supra* note 52 at 152.

in connection with allegations that he had fixed criminal cases.[75]

Closed proceedings and censored press reports can only increase this public ignorance about the judiciary. As Wigmore has noted:

> The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy. [6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438-439 (Chadbourn rev. 1976).]

Moreover, judges who wish to prevent proper criticism of their conduct are more likely to close post-indictment proceedings.[76] "Those who would order proceedings closed would be among those whose performance of official duties would be cloaked by the closing."[77] It has been noted that exposure of a judge's actions "may reveal much about his fitness to fill his office even though his acts do not prejudice the defendant in any way."[78]

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75 Rinaldi v. Holt, Rinehart and Winston, Inc., 42 N.Y.2d 369, 371 (C.A. 1977).

76 Rifkind, *When the Press Collides With Justice*, in Selected Essays on Constitutional Law 651, 653 (Ass'n of American Law Schools ed. 1963).

77 Fenner and Koley, *The Rights of the Press and the Closed Criminal Proceeding*, 57 Neb. L. Rev. 442, 481 (1978).

78 United States v. Cianfrani, 573 F.2d 835, 853 (3d Cir. 1978).

Effective public accountability for judges is also hindered by the fact that judges have extraordinarily long terms of office. In New York, for example, a trial judge is elected for a fourteen year term.[79] Without periodic review, a judge is almost entirely immune from direct accountability. The power to remove from public scrutiny his disposition of ninety percent of his criminal docket can only have the effect of decreasing any feeling of accountability. "Exposure is the only control over the corrupt and the petty, the tyrannous and the weak, the unjust, incompetent and the incapacitated."[80]

In part because of the independence and insulation of the judiciary, the public depends almost entirely upon the press for its information concerning the judiciary. As stated by this Court in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 491-492:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of govern-*

79 State of New York, Twenty-Second Annual Report of the Judicial Conference and the Office of Court Administration 3 (1977).

80 Fenner and Koley, *supra* note 77 at 478.

> *ment generally.* With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. [Emphasis added.]

Even persons who have had courtroom experience depend on the press for information about the judiciary.[81] Seventy-one percent of the general public believes that the media should play a role in demonstrating the effectiveness of courts and seventy percent wants the media to show how the court system works.[82]

To deny the press the opportunity to report on post-indictment proceedings, therefore, is to deny the public the opportunity to receive information concerning its public servants. Without news reports the public will remain unfamiliar, skeptical, and confused about the court system. Voter turnout will remain low, and inefficient or corrupt judges will be more likely to stay in office. Only with first-hand news reports of pretrial proceedings – in which much of the judiciary's work is done – can the public prepare itself to participate meaningfully in the political and electoral process.

C. Open Preliminary Hearings Serve as a Crucial Safeguard Against Abuse of the Law Enforcement System.

The concept of open trials developed in order to ensure integrity, honesty, and equality in the administration of justice. Thus, in addition to ensuring meaningful public parti-

81 Yankelovich at 2.

82 *Id.* at 13.

cipation in selecting judges, open post-indictment proceedings help prevent the possibility of abuse of the judicial process. As this Court noted in *In re Oliver*, 333 U.S. 257, 270 (1948), "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power."

As the overseers of the public business, the public, and, therefore, the press, have a vested interest in the conduct of every stage of judicial proceedings. According to this Court, "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). To fulfill its role as a check against governmental abuse, the public has a need for and a right to immediate and adequate information on the performance of its public servants.

Open proceedings are especially important as the means of facilitating public scrutiny during the course of all phases of the *criminal* process. The public and the press should be permitted to be present at hearings involving alleged crimes "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned * * * rather than permit[ting] such crucial steps in the criminal process to become associated with secrecy." *United States v. Clark*, 475 F.2d 240, 246-247 (2d Cir. 1973). Criminal proceedings, and in particular preliminary hearings, are crucial sources of information about law enforcement and its effectiveness.

As Mr. Justice Brennan noted in his concurring opinion in *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 605-606:

> [D]isclosure of the circumstances surrounding the obtaining of an involuntary confession or

> the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice. * * *

Law enforcement is a major concern of the American public. At present eighty-eight percent of the public views crime as a leading problem facing the United States.[83] The public looks to the judicial process as a key component in effective law enforcement.[84] Forty-three percent of the general public criticizes the courts for not reducing violent crime.[85] Because nearly nine out of ten criminal cases are completed prior to trial, it becomes imperative that the public have access to information concerning those pretrial processes. "Secrecy * * * can only breed ignorance and distrust of courts * * *." *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 587 (Brennan, J., concurring).

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83 *Id.* at 27.

84 President's Commission on Law Enforcement and Administration of Justice, *supra* note 57 at 128.

85 Yankelovich at ii.

As noted above, matters before the court in a post-indictment proceeding can be the crucial factors determining the outcome of a case. Among major issues normally decided in preliminary proceedings are the suppression of evidence based upon illegal searches, illegal seizures, or illegal entrapments; the suppression of involuntary confessions; the dismissal of indictments; the severance of defendants; the striking of defenses; the challenge to the voluntariness of pleas; the selection of juries; the determination of pretrial release conditions; and the appointment of counsel for indigents. Such proceedings shed light upon the capabilities and integrity of law enforcers. For example, a hearing on a motion to suppress a coerced confession may not only provide the public with information about the ineffectiveness of its public servants, but also explain why so many allegedly "guilty" persons go free. As Wigmore has recognized, trial participants working "'under the public gaze" are "more strongly moved to a strict conscienciousness in the performance of duty."[86]

Public exposure is necessary because "[j]udges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of judicial power, others might exercise it to prevent proper criticism of their own administrations."[87] Moreover, because it is extremely difficult to prove abuses of judicial discretion, judges have effective immunity from attacks in court with respect to most of their judicial acts. *Pierson v. Ray*, 386 U.S. 547 (1966). Thus, public scrutiny may serve as the only effective counterweight.

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86 6 J. Wigmore, Evidence in Trials at Common Law § 1834 at 438 (Chadbourn rev. 1976).

87 Rifkind, *supra* note 76 at 653.

A report by The New York State Commission on Judicial Conduct on abuses occurring during judicial proceedings indicates the importance of keeping all such proceedings open.[88] Such irregularities include the failure to render decisions on motions;[89] delays in dismissals;[90] questioning plaintiffs in a way that departs from the role of impartial judicial officers;[91] excoriating plaintiffs;[92] accusing attorneys of improper conduct;[93] rudeness and unwillingness to listen to those making proper applications;[94] interfering with the selection of juries;[95] exerting pressure on attorneys to settle by threats of retaliation;[96] prejudging the merits of cases;[97] refusing to honor attorneys' affidavits of actual engagement;[98] arbitrarily denying reasonable requests for adjournment;[99] negotiating with police officers for the with-

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88 New York State Commission on Judicial Conduct, Annual Report 96 (January 1978).

89 *Id.* at 96.

90 *Id.*

91 *Id.* at 104.

92 *Id.*

93 *Id.* at 105.

94 *Id.*

95 *Id.* at 103.

96 *Id.* at 105.

97 *Id.*

98 *Id.*

99 *Id.*

drawal of charges against friends;[100] sentencing defendants in a proceeding without having notified either the prosecuting attorney or defense counsel and even striking defendants.[101]

Similar abuses can occur because of prosecutorial abuse. Prosecutors have been granted the same common law immunity that judges enjoy.[102] Therefore, the only adequate check against abuses of their position is "the knowledge that their assertions will be contested * * * in open court." *Butz v. Economu*, 46 U.S.L.W. 4952, 4961 (U.S. June 29, 1978).

Exposure not only will protect against abuse by judges and prosecutors, but will guard against further abuse by those officials whose actions are called into question at pretrial hearings.[103] For example, pretrial proceedings frequently expose the maltreatment of prisoners by law enforcement officers during interrogations. Such abuses include physical brutality;[104] threats of physical brutality;[105] removal of prisoners from jail at night for questioning in secluded places;[106] keeping prisoners unclothed or standing

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100 *Id.*

101 *Id.*

102 Imbler v. Pachtman, 424 U.S. 409 (1976).

103 United States v. Clark, 475 F.2d 240, 246-247 (2d Cir. 1973).

104 Brown v. Mississippi, 297 U.S. 278 (1936).

105 Malinski v. New York, 324 U.S. 401 (1945).

106 White v. Texas, 310 U.S. 530 (1940); Vernon v. Alabama, 313 U.S. 547 (1941).

on their feet for long periods during questioning;[107] deprivations of sleep to sap a prisoner's strength;[108] disregard for the need for food;[109] threat of a lynch mob;[110] deception;[111] threats against a defendant's family;[112] misrepresentation of a co-defendant's confession in order to induce a confession;[113] protracted periods of questioning;[114] and holding a suspect incommunicado for days.[115]

Alleged abuse by police officers and other law enforcement officials during searches for evidence are often the subject of pretrial hearings. Examples of such abuses include the seizure of property without warrant when there was ample time to obtain one;[116] a three-hour warrantless search of a sixteen-room house and massive seizures;[117] an exhaustive search of a cabin and the seizure of its entire

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107 Lomax v. Texas, 313 U.S. 544 (1941).

108 Chambers v. Florida, 309 U.S. 227 (1940); Leyra v. Denno, 347 U.S. 556 (1954).

109 Payne v. Arkansas, 356 U.S. 560 (1958).

110 *Id.*

111 Spano v. New York, 360 U.S. 315 (1959).

112 Harris v. South Carolina, 338 U.S. 68 (1949).

113 Frazier v. Cupp, 394 U.S. 731 (1969).

114 Ashcraft v. Tennessee, 322 U.S. 143 (1944).

115 Davis v. North Carolina, 384 U.S. 737 (1966).

116 Trupiano v. United States, 334 U.S. 699 (1948).

117 Von Cleef v. New Jersey, 395 U.S. 814 (1969).

contents without a warrant;[118] a four-day warrantless search of entire premises and the seizure of 200-300 items;[119] a warrantless entry and seizure by IRS agents;[120] the misrepresentation of facts to establish probable cause in a warrant affidavit;[121] an illegal search without a warrant of a footlocker not in the immediate control of the owners;[122] a warrant issued by a law enforcement officer who was in charge of the investigation and the key prosecutor;[123] a warrantless search of an entire home at the time of arrest extending beyond the area under the defendant's immediate control;[124] an unreasonable. warrantless search and seizure of a union office when union officials had a reasonable expectation of the privacy of their records;[125] a warrant issued without sufficient information for a finding of probable cause;[126] governmental wiretapping and recording of a defendant's telephone conversation in violation of the Fourth Amendment;[127] and the failure to obtain a warrant from a neutral and detached magistrate.[128]

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118 Kremen v. United States, 353 U.S. 346 (1957).

119 Mincey v. Arizona, 46 U.S.L.W. 4737 (U.S. June 21, 1978).

120 G.M. Leasing Corp. v. United States, 429 U.S. 338 (1976).

121 Franks v. Delaware, 46 U.S.L.W. 4869 (U.S. June 26, 1978).

122 United States v. Chadwick, 433 U.S. 1 (1977).

123 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

124 Chimel v. California, 395 U.S. 752 (1969).

125 Mancusi v. DeForte, 392 U.S. 364 (1968).

126 Spinelli v. United States, 393 U.S. 410 (1969)

127 Katz v. United States, 389 U.S. 347 (1967).

128 Johnson v. United States, 333 U.S. 10 (1948).

Such abusive tactics have a dramatic effect upon law enforcement. A guilty person can be allowed back on the street because of illegal police practices. An innocent person can be deprived of his Constitutional rights. The public has a right to know about these abuses so that it may reform the system. A critical step in improving the conduct of law enforcement officials is to permit the press to report on post-indictment proceedings.

CONCLUSION

Amici began this brief with a review of the American concept of open courts dating back to the days before our Constitution was written when the colonies were still much affected by the British system, including both its protections and abuses. The Framers of the Sixth Amendment intended our courts to be open at all stages of their proceedings -- and in fact the courtrooms of this nation were probably *the single most important public forum* for the airing of local political and legal controversies during the period when America was primarily a rural nation.

With the emergence of large urban metropolitan areas, the local county courtroom *public forum* has been replaced by ever-growing and increasingly congested metropolitan court systems; and this demographic change has made it impossible for the average citizen to come to his court, as he did in the 18th and 19th centuries, to view the performances of justice in person.

This has meant, of course, that the citizen must rely more and more on the press to be his or her surrogate by monitoring courtroom proceedings. But the fundamental principle, envisioned by the Framers of the First and Sixth Amendments, should remain the same: our courts are *public forums*, and this Court should not suppress these

forums without strict procedural safeguards and overwhelming evidence of a clear and present danger to the administration of justice. *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Open courts provide safety and the assurance of justice for us all. Closed courts invite public mistrust and official malfeasance. We respectfully suggest that this is no time in our history to allow courts to avoid the strong strictures of *Nebraska Press Ass'n v. Stuart* by the simple device of closing their doors.

Respectfully submitted,

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Freedom of the Press
Legal Defense and Research Fund
1750 Pennsylvania Avenue, N.W.
Room 1112
Washington, D.C. 20006

RE: Gannett Co. Inc. v. Hon. Daniel A. DePasquale, as Judge of the Seneca County Court, et. al.

Dear Mr. Landau:

In response to your request, on behalf of The Honorable Daniel A. DePasquale, Kyle Edwin Greathouse, David Ray Jones and Stuart O. Miller, District Attorney of Seneca County, we hereby consent to the filing in the United States Supreme Court of an Amicus Curiae Brief by the Reporters Committee for Freedom of the Press which will be filed with the Court no later than August 15, 1978.

Sincerely yours,

Bernard Kobroff
Staff Attorney

BK/jlw

cc: Robert Bernius Esq.
Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, NY 14603

APPENDIX A

Nixon, Hargrave, Devans & Doyle
Attorneys and Counselors at Law
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July 7, 1978

Jack Landau, Esq.
Reporters Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Gannett Co., Inc. v. DePasquale, et al.

Dear Mr. Landau:

On behalf of Gannett Co., Inc. I hereby consent to an extension of the time for filing a brief amicus curiae by the Reporters Committee for Freedom of the Press up to and including August 15, 1978.

Very truly yours,

Robert C. Bernius

RCB:mtm

APPENDIX A

AFFIDAVIT

WILLIAM E. NELSON, being duly sworn, deposes and says,

1. I am an Associate Professor of Law at Yale Law School in New Haven, Connecticut.

2. I have authored a book entitled The Americanization of the Common Law.

3. During the course of my research on that book, I read every case that exists on record, as far as I know, in the Commonwealth of Massachusetts between the years of 1760 and 1830, with the exception of cases dealing with probate, divorce, and matters before the legislature.

4. In examining those records, I found no indication that the public had ever been excluded from any stage of any proceeding, including post-indictment proceedings in criminal cases.

5. Therefore, it would be my opinion, based on my research, that the common law and the common understanding of the period was that the public had a right to attend all stages of criminal proceedings.

William E. Nelson
WILLIAM E. NELSON

Dated:

Sworn to before me this
7th day of July, 1978

Patricia T. Gunnoud
PATRICIA T. GUNNOUD
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1981

APPENDIX B